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IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(a), a claim against an "agency or instrumentality" of a foreign state encompasses a claim against an individual foreign official;

2. Whether tort claims brought against foreign states and officials based on acts of terrorism committed in the United States must meet the conditions of the FSIA's "state sponsor of terrorism" exception, 28 U.S.C. § 1605A, and cannot be brought under the FSIA's exception for non-commercial tort claims, 28 U.S.C. § 1605(a)(5); and

3. Whether the Due Process Clause precludes U.S. courts from exercising personal jurisdiction over individuals who provide material support to terrorists outside the United States, knowing those terrorists intend to commit terrorist attacks in the United States.

PARTIES TO THE PROCEEDINGS

There are over 6,000 petitioners in these proceedings. They are listed in the appendix at Pet. App. K (299a-489a). A separate corporate disclosure statement for the corporate petitioners is included at Pet. App. L (490a-494a).

Respondents are the Kingdom of Saudi Arabia; the Saudi High Commission for Relief of Bosnia and Herzegovina; and Crown Prince Sultan bin Abdulaziz al-Saud, Prince Naif bin Abdulaziz al-Saud, Prince Salman bin Abdulaziz al-Saud, Prince Turki al-Faisal bin Abdulaziz al-Saud, and Prince Mohamed al Faisal al Saud.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are thousands of victims of the September 11, 2001 terrorist attacks on the United States. They respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 538 F.3d 71 (2d Cir. 2008), Pet. App. 1a-47a.

The opinions of the United States District Court for the Southern District of New York are reported at 349 F. Supp. 2d 765 (S.D.N.Y. 2005), Pet. App. 117a-238a, and 392 F. Supp. 2d 539 (S.D.N.Y. 2005), Pet. App. 54a-116a.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1603, 1605(a), and 1605A(a), are reproduced in the appendix at Pet. App. 239a-246a.

STATEMENT OF THE CASE

This petition is brought by thousands of victims of the September 11, 2001 attacks on the United States. It presents three related and important issues that have divided the courts of appeals concerning the ability of victims of terrorist attacks committed in this country to seek redress from foreign states and

officials who provide material support to terrorist organizations. In the course of dismissing the September 11th victims' tort claims against Saudi Arabia and five Saudi princes, the Second Circuit dramatically limited the scope of claims that victims of terrorism can assert under the Foreign Sovereign Immunities Act ("FSIA") and broadly limited federal courts' jurisdiction over persons who provide material support to terrorism.

Specifically, the Second Circuit held that (1) the FSIA provision limiting claims against a foreign state's "agency or instrumentality" also limits claims against foreign officials sued individually for their official actions; (2) no tort claims relating to terrorist activity may be brought under the FSIA provision authorizing tort claims for harm caused in the United States, 28 U.S.C. § 1605(a)(5), and such claims must instead be brought only under the FSIA provision meant to authorize claims for harm caused principally *outside* the United States by a handful of countries deemed state sponsors of terrorism, *id.* § 1605A;[1] and (3) the Due Process Clause bars U.S. courts' jurisdiction over persons who provide material support abroad to terrorist organizations—even those who know the organizations they are funding intend to attack the United States—unless those persons also directly carry out or command the specific terrorist attack at issue.

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[1] When this case was filed, the FSIA exception for state-sponsored terrorism was codified at 28 U.S.C. § 1605(a)(7). Congress repealed that provision on January 28, 2008 with respect to certain suits and reenacted it, with modifications, as § 1605A. Because the Second Circuit relied solely on § 1605A in reaching its decision, we refer to that section herein. By the terms of the 2008 Act, § 1605(a)(7) should govern this case if it is remanded.

Review of these issues is warranted because each presents a conflict with the decisions of other courts of appeals, and the Second Circuit's decision undermines Congress' efforts to provide redress for U.S. citizens harmed by the actions of foreign governments and officials and to prevent and punish those who provide material support to terrorism. The Second Circuit acknowledged that its first holding, concerning suits against foreign officials, deepened an existing split between the circuits and yielded an interpretation of the FSIA that the United States has long opposed (and has characterized as of "crucial importance"). The second holding, concerning FSIA §§ 1605(a)(5) and 1605A, is in direct conflict with the Ninth Circuit and other courts, which have held that the tort exception in § 1605(a)(5) does support terrorism-based tort claims, and is contrary to the D.C. Circuit's construction of the "state sponsor of terrorism" exception as addressing extraterritorial harm caused by acts of state-sponsored terror. The Second Circuit's third holding, construing the Due Process Clause to bar jurisdiction over those who provide material support to terrorists who target the United States, is in tension with several decisions of this Court and conflicts with decisions of the Seventh, Ninth, and D.C. Circuits. It also undermines important components of the United States' counterterrorism efforts that authorize criminal and civil proceedings directed at precisely the material support to terrorism that the Second Circuit ruled to be beyond U.S. courts' jurisdiction. This Court should grant this petition and resolve these conflicts.

A. The September 11th Victims' Claims

Petitioners are victims of the September 11, 2001 terrorism attacks. They include family members of the nearly 3,000 people killed in the attacks,

thousands of individuals who were severely injured as a result of the attacks, and governmental and commercial entities that incurred billions of dollars of property damage and other losses as a result of the attacks (collectively, the "victims" or "petitioners").

These victims brought suit against the nations, organizations, companies and individuals who deliberately channeled resources to al Qaeda in the years preceding September 11th, knowing that al Qaeda intended to use those resources to attack the United States and its citizens. The victims seek to hold responsible those who knowingly helped al Qaeda build and sustain its global infrastructure and thereby made possible the September 11th attacks.

This petition concerns petitioners' tort claims against the Kingdom of Saudi Arabia, five Saudi princes, and the Saudi High Commission for Relief of Bosnia and Herzegovina (SHC) for their roles in directing significant financial and logistical support to al Qaeda. Four of the princes are officials of the Saudi government, sued individually for actions undertaken in both their governmental and personal capacities. A fifth, Prince Mohamed al Faisal al Saud, is not a government official and is sued for actions taken in his personal capacity. The SHC is ostensibly a charity and is an acknowledged agent of the government of the Kingdom.

The close relationship between al Qaeda and Saudi "charitable" organizations, and between those organizations and the Saudi Government and its officials, is well documented. The 9/11 Commission noted that "Saudi Arabia has long been considered the primary source of al Qaeda funding." *The 9/11 Commission Report* 171 (2004). That funding was derived from "financial facilitators who raised money ... particularly in Saudi Arabia," many of

whom were instrumental in creating the "Golden Chain" that funded Osama bin Laden's jihadist activities, first in Afghanistan and later worldwide. *Id.* at 55, 66, 170. The Commission noted that "entire charities," and "employees of corrupt charities," "participated in funneling money to al Qaida." *Id.* at 170. These "charities" "were a source of money and also provided significant cover, which enabled operatives to travel undetected under the guise of working for a humanitarian organization." *Id.* at 171. The victims have alleged that several of these charities were dominated and controlled by the Saudi Government, and were therefore agents and alter-egos of the Kingdom.

The United States government has named several of these charities as providers of material support to al Qaeda and other terrorist organizations that target the United States.[2] In the years since the September 11th attacks, the U.S. Government has also repeatedly expressed concerns about the terrorist aims of the Saudi charities, and about Saudi Arabia's failure to use its authority over them to rein in their terrorist conduct.[3]

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[2] *See* Exec. Order 13,224, 66 Fed. Reg. 49,079, 49,082 (Sept. 23, 2001); 31 C.F.R. ch. V, app. A; *see also* Additional Designation of an Entity Pursuant to Exec. Order 13,224, 73 Fed. Reg. 37,529, 37,530 (July 1, 2008); Additional Designation of Individuals and Entities Pursuant to Exec. Order 13,224, 71 Fed. Reg. 45,599, 45,600 (Aug. 9, 2006); Additional Designations of Terrorism-Related Blocked Persons, 68 Fed. Reg. 399 (Jan. 3, 2003).

[3] *See, e.g., Starving Terrorists of Money—The Role of Middle Eastern Financial Institutions: Joint Hearing Before the House Comms. on Fin. Servs. & Int'l Relations*, 109th Cong. 78-79 (May 4, 2005) (testimony of Paul Simons, Deputy Assistant Sec'y of State) ("concerned U.S. government agencies" pushed the Saudi Government to rein in charities after September 11th, and the

Petitioners' claims against Saudi Arabia in this case concern the attributable actions of charities under the Saudi government's control and actions of Saudi officials who used their offices to support al Qaeda's global jihad. The victims have alleged that "[o]stensible charitable organizations, and in particular, Islamic charities under the control of the Kingdom of Saudi Arabia ... are fully integrated components of al Qaida's organizational structure, and are actively involved at every level of al Qaida's operations, from recruitment and training of new members, to the planning and conduct of terrorist attacks." See First Amended Compl. of Plaintiffs Federal Ins. Co. *et al.* ¶ 79, No. 1:03-md-1570 (S.D.N.Y., filed Mar. 10, 2004) (hereinafter "Compl."). These "charities" have "served as the primary vehicle for raising, laundering and distributing funds on behalf of al Qaida from its inception," and "have provided arms, false travel documentation, physical assets and logistical support to al Qaida." *Id.*; see also *id.* ¶ 80. As the court of appeals acknowledged, the victims' allegations "include a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda." Pet. App. 5a.

U.S. "continue[s] to stress in our discussions with the Saudis the need for full implementation" of those efforts); *Money Laundering and Terror Financing Issues in the Middle East: Hearing Before the Sen. Comm. on Banking, Housing & Urban Affairs*, 109th Cong. 43-44 (July 13, 2005) (testimony of Stuart Levey, Under Sec'y of Terrorism & Financial Intelligence, Treasury Dep't) (Saudi charities remain "a significant source of terrorist financing" and "continue to cause us concern," and the Saudi Government must continue to address "vulnerabilities" in its control of these groups); *see generally* Cong. Research Serv., Report to Congress, *Saudi Arabia: Terrorist Financing Issues* (Dec. 8, 2004).

The complaint also describes in detail the extensive support provided to al Qaeda by each of the Kingdom's controlled charities, Compl. ¶¶ 84-216, including exhaustive allegations and evidence of the Kingdom's rigid control of the operations and activities of those charities, *id.* ¶¶ 79, 85, 114-115, 131-132, 151-152, 168-169, 181, 191, 203, 208-209, 399, 408, 410, 427, 435-437. Several of the charities acknowledged in district court pleadings that they are instrumentalities of the Saudi Government, and the SHC admitted to the court of appeals that it "is an agency of" and is "control[led] by" the Kingdom. Br. of Defendant-Appellee Saudi High Comm'n, at 5, 24. The uncontested allegations and evidence establish that the charities are dominated and controlled by the Kingdom, and are agents and alter-egos of the Saudi state.

The September 11th victims also explained how the government official defendants, each of them a Saudi prince, used their government positions to channel financial and logistical support to al Qaeda through the Kingdom's controlled charities. Compl. ¶¶ 426-464. These government officials supported al Qaeda largely through their activities as members of the Supreme Council of Islamic Affairs, a governmental body established to oversee and direct the Kingdom's controlled charities, or through their roles as officials of the charities themselves. *Id.*

Saudi officials also knew of al Qaeda's use of terrorism, including its intent and practice of targeting U.S. citizens and interests, well before September 2001. The charities in question were repeatedly implicated in terrorist plots and attacks in

the years preceding the September 11th attacks,[4] and the Saudi Government closely monitored these developments. *Id.* ¶¶ 114-115, 131-132, 151, 168-169, 181, 191, 203, 208, 399. Saudi government officials were also aware, for several years prior to September 11, 2001, that these charities were al Qaeda fronts, not least because U.S. and allied officials met with them repeatedly to discuss the charities' extensive terrorist ties. *Id.* ¶¶ 400, 429, 431, 435-441, 443, 445, 456, 463. The complaint notes that Osama bin Laden's *fatwa* in 1998 was widely reported and publicly announced al Qaeda's intent to kill Americans—civilian or military—wherever possible, *id.* ¶ 42, and many of the Saudi-controlled charities participated directly in furthering these goals, see, *e.g.*, *id.* ¶¶ 122, 138-140, 169-173, 186, 458. Al Qaeda's capacity to execute those threats became abundantly clear through a series of terrorist attacks in the 1990s, including the 1998 bombings of the U.S. embassies in Kenya and Tanzania and the 2000 bombing of the *U.S.S. Cole*.

The September 11th victims asserted tort claims against the Kingdom of Saudi Arabia, sued four of the five Saudi princes individually for supporting al Qaeda in their capacities as officials of the Kingdom, and sued all five princes for the material support they personally provided to al Qaeda. These latter claims were based principally on personal contributions the princes made to al Qaeda through its known charity fronts. *Id.* ¶¶ 430-431, 442-443, 451-452, 461-463.

In response to the victims' complaint, Saudi Arabia and the SHC moved to dismiss the claims asserted against them on the ground that they were immune

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[4] *See* Compl. ¶¶ 110, 117-123, 126, 137-140, 143, 147, 159-160, 162-163, 173-174, 176, 193, 197-198, 200, 204.

from suit under the FSIA. The four Saudi princes who are government officials each separately moved to dismiss the claims based on their official conduct under the FSIA. All five princes moved to dismiss the claims based on their personal conduct, arguing that the court lacked personal jurisdiction over them.

The September 11th victims argued in response that the FSIA authorized their tort claims under the exception to sovereign immunity it provides for claims for damages caused by "the tortious act or omission of that foreign state." 28 U.S.C. §1605(a)(5). Certain of the September 11th victims argued that the FSIA did not bar any of the claims advanced against the Saudi officials individually because "officials" are not included within the definition of the term "foreign state" under the FSIA. The victims further argued that the district court possessed jurisdiction over the Saudi princes because their support for al Qaeda was necessarily directed at the United States in light of al Qaeda's public declarations of jihad against the United States, and that the defendants could therefore reasonably anticipate being haled into a U.S. court to respond to claims based on the attacks within the United States.

B. The District Court's Decisions

On January 18, 2005, the district court granted the motions to dismiss of Saudi Arabia and two Saudi officials. The court held that "'[i]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities,'" Pet. App. 135a, and that the FSIA's tortious act exception did not provide subject matter jurisdiction for plaintiffs' tort claims against the Kingdom or against the Saudi officials for their official acts. The court found that the defendants' support for al Qaeda—even if tortious within the meaning of the FSIA provision—was

"grounded in social, economic, and political policy," and therefore involved the exercise of discretionary governmental conduct excluded from the FSIA authorization. *Id.* at 148a, 164a, 167a.

The court also ruled that it lacked personal jurisdiction over the two Saudi officials and thus dismissed the victims' claims based on those officials' private sponsorship of al Qaeda. Although the judicial record contained "many examples of Osama bin Laden's and al Qaeda's public targeting of the United States," the court nonetheless found that plaintiffs had failed to present sufficient "specific facts" to establish that the officials knew the charities enjoying their support were funneling money to al Qaeda. Pet. App. 161a, 172a, 187a. The court similarly ruled that it lacked personal jurisdiction over a third Saudi prince, Prince Mohamed, who is not a Saudi official, reasoning that plaintiffs failed to establish that the acts of financial institutions he controlled should be imputed to him. *Id.* at 193a-194a.

On September 21, 2005, the district court extended the reasoning of its earlier decision to the claims against SHC and the two additional Saudi officials. Pet. App. 54a-116a.

C. The Court of Appeals' Opinion

On August 14, 2008, the Second Circuit affirmed the district court's decision, albeit on largely different grounds.

First, the panel held that the FSIA's protections apply not only to Saudi Arabia itself and to the SHC as an "agency or instrumentality" of Saudi Arabia, but also to claims against the Saudi officials acting in their official capacities. The panel acknowledged that the Second Circuit had not determined whether such officials are immune from suit as an "agency or

instrumentality" of the state, and expressly acknowledged the split among the circuits on this issue. It observed that the Seventh Circuit had held that the FSIA does not include state officials within the protection afforded an "agency or instrumentality" because, had Congress intended that result, "'it would have done so in clear an unmistakable terms.'" Pet. App. 15a (quoting *Enahoro* v. *Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)). The panel noted that the United States, through the Departments of Justice and State, had also argued elsewhere that the FSIA extends only to states, not individuals. *Id.* at 18a-19a.

The panel emphasized, however, that the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits had reached the opposite conclusion. Pet. App. 14a; see *infra* at 15-16. The panel determined that it would "join the majority of Circuits" and broadly construed "agency or instrumentality" in the FSIA to include individuals. Pet. App. 19a. It reasoned that "[t]his reading of 'agency' is consistent with the evident principle that the state cannot act except through individuals," and analogized its ruling to the protections against suit provided by the act of state doctrine, the scope of immunity from suit alleging a violation of 42 U.S.C. § 1983, and the immunity afforded to a Senator's aides. *Id.* at 20a-21a (citing *Monell* v. *Dep't of Social Servs.*, 436 U.S. 658 (1978), and *Gravel* v. *United States*, 408 U.S. 606 (1972)). And, the panel noted that a separate, subsequently enacted provision of the FSIA addressed the immunity of "an official, employee, or agent of [a] foreign state" in certain circumstances, see 28 U.S.C. § 1605A(a)(1), and thus Congress must have intended the same result (albeit *sub silentio*) in other provisions of the statute. Pet. App. 21a-22a.

Second, the panel held that the September 11th victims' claims against Saudi Arabia and the four government officials did not fall within the FSIA's non-commercial tort exception, which authorizes claims for "money damages ... for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). The panel reasoned that this provision could not be extended to acts of terrorism or where "tortious conduct took the form of providing material support to terrorists." Pet. App. 28a. The panel primarily relied on a separate, subsequently enacted FSIA provision, 28 U.S.C. § 1605A, which authorizes claims for damages principally incurred *outside* the United States caused by terrorist actions facilitated by countries designated by the U.S. government as state sponsors of terrorism.

The panel held that section 1605A, which it termed the FSIA's "terrorism exception," exclusively addresses recovery for acts such as the September 11th attacks. According to the panel, "to apply the Torts Exception where the conduct alleged amounts to terrorism within the meaning of the Terrorism Exception would evade and frustrate the key limitation[s] on the Terrorism Exception." Pet. App. 31a. Section 1605A by its terms applies "in any case not otherwise covered by this chapter," which includes the FSIA tort exception, but the panel construed this provision as *precluding* any terrorism-related claims under other FSIA provisions and as confirming that "the Terrorism Exception stands alone." *Id.* at 33a. Thus, the panel held that the FSIA precludes claims against foreign states or their

officials for any terrorist actions or other similar tortious conduct undertaken in the United States, unless the perpetrator was affiliated with one of the few governments designated as state sponsors of terrorism by the U.S. government.

Third, the panel held that no personal jurisdiction existed over any of the Saudi princes, thus requiring dismissal of the victims' claims against them in their personal capacities. The panel held that "[e]ven assuming that the [princes] were aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and the U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts." Pet. App. 43a-44a. "[T]hat acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda" was insufficient because the September 11th victims would have to show "that the [princes] 'expressly aimed' intentional tortious acts at residents of the United States." *Id.* at 44a (quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984)).

The panel did acknowledge that "five opinions from other circuits" had found personal jurisdiction over terrorists and their supporters who directed their actions against U.S. interests. Pet. App. 41a-42a; see *infra* at 29-30. Even so, the panel distinguished those cases on the ground that the September 11th victims did not "allege that the [Saudi princes] directed the September 11 attacks or commanded an agent (or authorized al Qaida) to commit them." Pet. App. 42a. The panel concluded that the Due Process Clause precluded U.S. courts from asserting jurisdiction over defendants who provided material support to terrorists, even where the defendants

"could and did foresee that recipients of their donations would attack targets in the United States." *Id.* at 43a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION EXTENDING FSIA IMMUNITY TO FOREIGN OFFICIALS SUED FOR THEIR OFFICIAL ACTS DEEPENS A CONFLICT AMONG THE COURTS OF APPEALS AND ADOPTS A POSITION OPPOSED BY THE UNITED STATES AS CONTRARY TO NATIONAL INTERESTS OF "CRITICAL IMPORTANCE."

This case presents an acknowledged conflict among the circuits over whether the FSIA's provisions governing suits against foreign *states* also applies to suits against foreign *officials* for their official actions. That conflict addresses a discrete and important issue of statutory construction: whether such foreign officials are, for purposes of the FSIA, an "agency or instrumentality of a foreign state." Concurring with the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits, the Second Circuit answered that foreign officials are "an agency or instrumentality." The Seventh Circuit has answered that they are not, as has the United States in litigation involving suits against foreign officials. The Second Circuit's reasoning is also in considerable tension with decisions of the Tenth and Eleventh Circuits.

This conflict concerns the central provision of the FSIA determining the scope of foreign sovereign immunity. The FSIA precludes claims against a "foreign state" unless those claims fall within a specific FSIA exception. See 28 U.S.C. § 1604; *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). A foreign

state, for this purpose, is the state itself, a "political subdivision," or "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).[5]

The Second Circuit concluded that "an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the FSIA." Pet. App. 14a; see *supra* at 10-11. In this respect, it canvassed and followed the reasoning of the Ninth Circuit, which concluded that the FSIA completely displaced common law immunity and "rejected the view, advanced by the Department of Justice [before the Ninth Circuit], that the foreign state is protected by the FSIA while its officials are otherwise protected by common law immunity," subject to "'the discretionary role of the State Department'" in determining the scope of that common law immunity. Pet. App. 18a-19a (addressing and quoting *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990)). The Ninth Circuit in *Chuidian* recognized that § 1603 "more readily connot[es] an organization or collective" than individuals, but concluded that because the legislative history did not demonstrate "an intent to exclude individual officials," they should be included.

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[5] "[A]n agency or instrumentality of a foreign state," is defined as "any entity"

> (1) which is a separate legal person, corporate or otherwise, and
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> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

28 U.S.C. § 1603(b).

912 F.2d at 1101.[6] Four other circuits have followed the Ninth Circuit's lead, citing *Chuidian* with little or no discussion. See *Velasco* v. *Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *Keller* v. *Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd* v. *Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Jungquist* v. *Sheikh Sultan bin Khalifa al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

The Seventh Circuit, in contrast, has rejected *Chuidian*'s reasoning and held that the FSIA's reference to "agency or instrumentality" clearly does not include "natural person[s]," and instead encompasses only "legal person[s]" like corporations and agencies. *Enahoro* v. *Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). "If Congress meant to include individuals acting in the[ir] official capacity in the scope of the FSIA," the court noted, "it would have done so in clear and unmistakable terms." *Id.* The Seventh Circuit criticized *Chuidian* and its progeny, stating it was "troubled" by that case because "saying Congress did not exclude individuals[,] therefore they are included [is] upside down as a matter of logic, [and] ignores the traditional burden of proof on immunity issues under the FSIA." *Id.* at 882 ("The ultimate burden of proving immunity rests with the foreign state.").

In a related context, the Tenth and Eleventh Circuits have also determined that such "inclusion by

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[6] *But see* H.R. Rep. No. 94-1487, at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 ("[A]n 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry.").

omission" is inappropriate in construing the scope of the FSIA. See *Southway* v. *Central Bank of Nigeria*, 198 F.3d 1210, 1214 n.4 (10th Cir. 1999) ("because the FSIA does not address criminal sovereign immunity, Defendants' argument that they enjoy criminal sovereign immunity under the FSIA ... necessarily fails"); *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (same).

The United States has consistently urged before federal courts that the phrase "agency and instrumentality" does *not* extend to foreign officials acting in their official capacity. Those views—expressed by the Departments of State and Justice in statements of interest filed before the Ninth Circuit in *Chuidian* and, more recently, in two cases in the Second Circuit, *Kensington Int'l Ltd.* v. *Itoua*, 505 F.3d 147 (2d Cir. 2007), and *Matar* v. *Dichter*, No. 07-2579-cv (2d Cir., filed June 14, 2007) ("*Dichter II*"), on appeal from *Matar* v. *Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (*Dichter I*)—confirm the importance of this issue.

The United States has explained that construing FSIA § 1603 to apply to individual foreign officials "runs contrary to the statute's text and legislative history, post-FSIA case law, and customary international law." U.S. Statement (*Dichter I*) (Nov. 17, 2006), Pet. App. 259a. "[C]ommon-law immunity for foreign officials," the United States has argued, "endures as a vital complement to the FSIA's grant of immunity to foreign states." *Id.* at 260a. In *Kensington*, the United States argued that "the immunity of individual foreign officials is not governed by the FSIA. Rather, the immunity available to such officials stems from longstanding common law that the FSIA did not displace." U.S. Statement (*Kensington*) (May 23, 2007), Pet. App.

251a. It also criticized *Chuidian* and the cases that followed it as "unsound and yield[ing] problematic results," and based upon a "flawed rationale that ... is inconsistent with [the FSIA's] text and legislative history." *Id.* at 251a, 254a; see also U.S. Statement (*Chuidian*) (Mar. 21, 1988), Pet. App. 247a-248a (Congress intended that the FSIA "'deal[] only with the immunity of foreign states,'" and thus "the FSIA is not the controlling authority to determine the question of sovereign immunity" for individuals) (quoting H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620).

The United States has explained that it is of "critical importance" that FSIA § 1603 not be construed to include foreign officials; such a construction would potentially "bring U.S. sovereign immunity law into conflict with customary international law," U.S. Statement (*Dichter I*), Pet. App. 278a, 282a, and could place U.S. officials at greater risk of suit abroad. Making foreign officials subject to the FSIA's rigid statutory regime—and not the common-law regime under which the State Department weighs foreign policy considerations in determining whether to waive immunity in a given case—is "rife with potential to disturb foreign relations." Br. of the United States as *Amicus Curiae* (*Dichter II*) (Dec. 19, 2007), Pet. App. 286a-288a, 297a. It is thus "of critical importance that American courts recognize the same immunity defense for foreign officials" that is recognized at common law, "as any refusal to do so could easily lead foreign jurisdictions to refuse such protections for American

officials in turn." U.S. Statement (*Dichter I*), Pet. App. 282a.[7]

The United States' focus on the scope of the FSIA compared to common law immunity points to another source of tension among the courts of appeals. The Second Circuit's decision and the rest of the *Chuidian* line of cases do not recognize any continuing role for common law immunity and thus run squarely against decisions of other circuits recognizing that common law immunity for heads of state, consular officers, and other government leaders survived the FSIA's passage. The Second Circuit noted, for example, that its decision extending FSIA immunity to individuals resolved earlier "'doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity.'" Pet. App. 13a (quoting *Tachonia* v. *United States*, 386 F.3d 205, 220 (2d Cir. 2004)). The Eleventh Circuit has held the opposite: the FSIA was never intended to displace common law "head-of-state" immunity, which remains the only source of immunity for such officials. *Noriega*, 117 F.3d at 1212; *accord Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) ("The FSIA refers to foreign states, not their leaders," and thus immunity for such individuals "remains vested where it was prior to 1976—with the Executive Branch.").[8] The United

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[7] The question whether the princes would be entitled to common-law immunity for their actions in this case was not considered by the courts below, nor has the State Department considered whether to waive such immunity if it exists. If the Second Circuit's decision is reversed, these questions would be addressed on remand.

[8] *See also Doe* v. *Roman Catholic Diocese*, 408 F. Supp. 2d 272, 277-78 (S.D. Tex. 2005) (foreign official liability, including head-of-state and diplomatic immunity, continues to be governed by the pre-FSIA, common law framework); *Plaintiffs A, B, C, D, E,*

States has argued such cases were correctly decided, and "[t]he same reasoning applies to the immunity of individual officials other than heads of state: the FSIA did not address their immunity, and so did not supplant it as it previously existed at common law." U.S. Statement (*Kensington*), Pet. App. 254a-255a.

The square conflict among the circuits concerning whether the FSIA applies to individual foreign officials is reason enough to warrant review by this Court. The view of the United States that the issue is of central importance makes review of the question presented compelling.

II. THE SECOND CIRCUIT'S NARROW CONSTRUCTION OF THE FSIA'S "NON-COMMERCIAL TORT EXCEPTION" CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND DRAMATICALLY LIMITS VICTIMS' ABILITY TO RECOVER FOR ACTS OF TERRORISM COMMITTED IN THE UNITED STATES.

The Second Circuit construed the FSIA's "non-commercial tort exception" to exclude all claims against foreign states based on acts of terrorism, and construed FSIA's "state sponsor of terrorism exception" as the exclusive basis for asserting tort claims for such acts, including acts of terrorism committed in the United States. As a result, only the handful of countries designated as state sponsors of terrorism and their agencies can be sued for supporting acts of terrorism undertaken in the United States. The Second Circuit's decision conflicts with decisions of courts, including the Ninth Circuit, that have held that the tort exception authorizes

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F v. Jiang Zemin, 282 F. Supp. 2d 875, 881 (N.D. Ill. 2003) (same).

claims based on terrorism in the United States, and with other decisions, including those of the D.C. Circuit, that recognize that the FSIA's exception for state sponsors of terror exclusively governs only claims based on acts of terrorism resulting in injuries *outside* the United States.

The non-commercial tort exception, enacted in 1976, authorizes claims seeking "money damages ... for personal injury or death ... occurring in the United States and caused by the tortious act or omission of [a] foreign state or any official or employee of that foreign state." 28 U.S.C. § 1605(a)(5). On its face, that language describes precisely the claims of the September 11 victims. In 1996, Congress enacted a separate exception for state-sponsored terrorism, which it then updated and replaced in 2008. *Id.* § 1605A(a) (superseding *id.* § 1605(a)(7)). This section applies to "any case *not otherwise covered* by this chapter" for claims based on certain terrorist acts undertaken by a "designated ... state sponsor of terrorism" and causing harm anywhere in the world. *Id.* (emphasis added).

The Second Circuit held that *all* terrorism-related claims must meet § 1605A's stringent requirements, and that § 1605(a)(5)'s tort exception does not support any claim arising from acts of terrorism. Pet. App. 31a-33a. Thus, victims of terrorist acts committed in the United States can assert claims against only the few countries (and agencies of those countries) that the State Department has formally designated as state sponsors of terrorism: currently Iran, Cuba, Sudan, and Syria, but not, for example, China,

Russia, Pakistan, Libya, North Korea, Somalia, Yemen, Afghanistan, Venezuela—or Saudi Arabia.[9]

In direct conflict with the Second Circuit, the Ninth Circuit and the District of Columbia District Court have held that the FSIA non-commercial tort exception expressly authorizes claims based on acts of terrorism in the United States, including claims against any foreign country that supports those acts. In *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989), the Ninth Circuit considered whether the FSIA authorized tort claims brought against the Republic of China for the assassination of Henry Liu in California. The complaint alleged "that the [Republic of China] was involved in the conspiracy to kill" Liu, a journalist who had been critical of the Republic. *Id.* at 1421-22. The Ninth Circuit held that the plaintiff had asserted tort claims for a politically motivated murder "which occurred within the United States," and thus fulfilled the unambiguous requirements of the FSIA's tort exception. *Id.* at 1424-25.[10]

More recently, the District of Columbia District Court rejected the Second Circuit's reasoning and held that the non-commercial tort exception "seems facially to apply" to terrorist acts committed in this country, including the same terrorist acts at issue in this case. *Doe* v. *bin Laden*, __ F. Supp. 2d __, 2008 WL 4416735, at *3 (D.D.C. Sept. 30, 2008) (addressing tort claims against Afghanistan and its officials for the 9/11 attacks). The court applied § 1605(a)(5)'s tort exception as written and reasoned

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[9] *See* U.S. Dep't of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm (last visited Nov. 10, 2008).

[10] There can be no doubt that extrajudicial killing is an act of terrorism; indeed, 28 U.S.C. § 1605A (and its predecessor, § 1605(a)(7)) defines foreign terrorism to include such acts.

that it would be "peculiar" and "absurd" to think that § 1605A was meant to limit liability for terrorist attacks, even those committed in the United States, to those few countries designated as "state sponsors"—a result Congress "clearly did not intend." *Id.* (quotation marks omitted). The same court, in *Letelier* v. *Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), earlier held that the tort exception provided jurisdiction for claims against Chile arising from the assassination of a former Chilean ambassador and foreign minister in Washington, D.C. The plaintiffs alleged that Chile and its intelligence agency had conspired with and aided the individuals who carried out the assassination, and the court concluded that the language of the tort exception unambiguously covered such conduct. *Id.* at 672-73; see also *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998) (citing *Liu* and *Letelier* as establishing that "28 U.S.C. § 1605(a)(5) already provides jurisdiction over state-sponsored terrorist acts in the United States").

The Second Circuit's holding that the "state sponsor of terrorism" exception is the exclusive basis for claims against foreign states based on acts of terrorism committed in the United States also is directly contrary to the D.C. Circuit's recognition that Congress designed that exception to *expand* the scope of recovery for victims of terrorism. As the D.C. Circuit held, the state sponsor of terrorism exception was designed to remedy the fact that "[u]nder the original FSIA, ... terrorism, torture, and hostage taking committed abroad were immunized forms of state activity." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88 (D.C. Cir. 2002). But terrorism committed in *this* country was never so immune because it "occurr[ed] in the United States" and was thus subject to the tort exception. 28 U.S.C.

§ 1605(a)(5). Section 1605A (and its predecessor, § 1605(a)(7)), in contrast, applies to certain terrorist actions *regardless* of where they occur; "the only required link between the defendant nation and the territory of the United States is the nationality of the claimant." *Price*, 294 F.3d at 90; see *Doe*, 2008 WL 4416735, at *2-3 & n.2; *Flatow*, 999 F. Supp. at 15 (the state sponsor of terrorism exception supports claims based on "extraterritorial conduct, [and] one of its express purposes is to affect the conduct of terrorist states outside the United States, in order to promote the safety of United States citizens traveling overseas").

The Second Circuit's decision also contradicts the D.C. Circuit's decision in *Price* by holding that excluding acts of terrorism from the scope of the non-commercial tort exception serves the separation of powers by allowing the Executive Branch to determine which foreign states should be subject to suit. The Second Circuit cited *Price* to support this theory, see Pet. App. 31a, but the D.C. Circuit's decision provides no support. As the D.C. Circuit explained, because judicial systems traditionally address wrongdoing within a country's borders, only the extension of liability for *extraterritorial* acts presents diplomatic sensitivities that require Executive Branch determinations, and the Executive Branch initially opposed extending the FSIA to encompass *overseas* acts on the ground that this extension "might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States." *Price*, 294 F.3d at 89. The resulting compromise limited the FSIA's extension of liability for extraterritorial terrorism to claims against only those few countries designated by

the State Department as state sponsors of terrorism, but this does not suggest that Congress intended to narrow claims for terrorism *in the United States* or to have the Executive Branch determine the scope of those claims.

Finally, the Second Circuit's counterintuitive construction of § 1605A(a)(1)—which states that the state sponsor of terrorism exception applies only to claims "not otherwise covered" by other provisions of the FSIA, including § 1605(a)(5)'s tort exception—creates considerable tension with decisions of other circuits that have construed a parallel FSIA provision to mean the opposite. The Second Circuit construed the term "not otherwise covered" to mean that terrorism claims could *not* be brought under any other provision of the FSIA, rather than to mean that some terrorist acts are "otherwise covered" by the FSIA, and § 1605A applies only to those that are not. See Pet. App. 33a. The Second Circuit's construction is an obvious misreading of the statute.

It also conflicts with several circuits' longstanding interpretation of the tort exception, which by its terms applies to cases "not otherwise encompassed" by the FSIA's exception for commercial activity. 28 U.S.C. § 1605(a)(5). Other circuits have consistently construed that language to create a hierarchy of claims under which subsection (a)(2) is the dominant provision, and subsection (a)(5) applies only to the extent a claim does not fairly come within the terms of (a)(2). See *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 35 (D.C. Cir. 2000); see also *Southway*, 198 F.3d at 1219 (10th Cir); *Export Group* v. *Reef Indus., Inc.*, 54 F.3d 1466, 1473, 1477 (9th Cir. 1995); *Vermeulen* v. *Renault U.S.A., Inc.*, 985 F.2d 1534, 1544 n.13 (11th Cir. 1993); see also *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S.

428, 439 (1989) (§ 1605(a)(5) applies only to "*non-commercial* torts") (emphasis added).

III. THE SECOND CIRCUIT'S HOLDING THAT THE DUE PROCESS CLAUSE BARS PERSONAL JURISDICTION OVER MATERIAL SUPPORTERS OF TERRORISM IS INCONSISTENT WITH THIS COURT'S PRECEDENTS, CONFLICTS WITH THE HOLDINGS OF OTHER COURTS, AND IMPERILS NUMEROUS U.S. COUNTERTERRORISM MEASURES.

The Second Circuit held that the Constitution permits federal courts to assert personal jurisdiction over only those who "directed" terrorist attacks or "commanded an agent ... to commit them," but bars jurisdiction over persons who "could and did foresee that recipients of their donations would attack targets in the United States." Pet. App. 42a-43a. Even a showing that a defendant "intended to fund al Qaeda" and did so with full knowledge of "Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on [U.S. interests]" would be "far too attenuated to establish personal jurisdiction in American courts." *Id.* at 43a-44a. In holding that U.S. courts cannot adjudicate claims against persons who provide material support abroad to terrorists known to target the United States, the Second Circuit distorted the Due Process decisions of this Court, created a conflict with the Seventh, Ninth, and D.C. Circuits, and adopted a rule with the potential to undermine some of this country's most important counterterrorism measures directed against those who provide material support to terrorist organizations.

A. The Second Circuit's analysis departs markedly from this Court's precedents. The Due

Process Clause permits an assertion of jurisdiction where the defendant's conduct is "such that he should reasonably anticipate being haled into court" in the forum. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Where actions involving the defendant "were expressly aimed" at the forum, and the defendant knew "that the brunt of that injury would be felt" in the forum, a court has jurisdiction over claims against the defendant arising from that conduct. *Calder* v. *Jones*, 465 U.S. 783, 789-90 (1984); see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (a defendant need only have "'fair warning that a particular activity may subject [him] to the jurisdiction of a foreign sovereign'").

The Second Circuit's bar on jurisdiction based on a defendant's provision of material support to terrorism directed at the forum establishes a rule at odds with this Court's precedents. Although it is true that merely foreseeing a possible injury is not alone sufficient to establish jurisdiction, "[t]his is not to say ... that foreseeability is wholly irrelevant" to the inquiry. *World-Wide Volkswagen*, 444 U.S. at 297. Instead, the relevant question is whether the defendant could reasonably foresee that his purposeful actions might give rise to liability in the forum. *Id.*; *Burger King*, 471 U.S. at 472; *Calder*, 465 U.S. at 789-90. That standard is certainly met here.

This is not a case where a third party's "unilateral act" is the only connection to the forum. See *Asahi Metal Indus. Co.* v. *Super. Court*, 480 U.S. 102, 109-10 (1987) (citing *World-Wide Volkswagen*, 444 U.S. at 295-98). Rather, as petitioners have alleged (and as the Second Circuit assumed), the defendants *knowingly* funneled money to al Qaeda *knowing* al Qaeda intended to use those funds to attack U.S. civilians in the United States. See, *e.g.*, Pet. App.

43a-44a; Compl. ¶¶ 430-431, 442-443, 451-452, 461-463. It is thus hardly unfair or unforeseeable that the princes would face court proceedings in this country when al Qaeda did precisely what it committed to do with the princes' money. The provision of material support to terrorists whose express aim is to kill the citizens of another country surely gives a person "'fair warning that [that activity] may subject [him] to the jurisdiction of a foreign sovereign.'" *Burger King*, 471 U.S. at 472.

B. The Second Circuit's decision also conflicts with decisions of the Seventh, Ninth, and D.C. Circuits, and other federal courts. In *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997), for example, the Seventh Circuit, per Judge Easterbrook, held that when suing in tort "the state in which the injury (and therefore the tort) occurs may require the wrongdoer to answer for its deeds even if events were put in train outside its borders." *Id.* at 1202. "[T]here can be no serious doubt after *Calder* v. *Jones*," the court continued, "that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." *Id.*

The Ninth Circuit held to like effect in *Panavision International, L.P.* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998): under *Calder*'s "'effects test,'" "jurisdiction may attach if the defendant's conduct is aimed at *or has an effect in* the forum state." *Id.* at 1321 (emphasis added); see *id.* at 1321-22 (defendant knew his website infringed the plaintiff's trademark, and he "knew Panavision would likely suffer harm" in California, thus establishing personal jurisdiction). The Second Circuit (without citing these cases) held the opposite: the princes are accused of tortious conduct knowingly directed against the United States

and causing injury here, and yet jurisdiction is lacking.

This split extends to D.C. Circuit precedent arising directly in the context of actions against terrorists who target the United States. In *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), the D.C. Circuit held that personal jurisdiction exists over individuals (like the princes) who participate in a "conspiracy to attack the United States, with overt acts occurring within this country's borders." *Id.* at 13. The court flatly rejected the view that the defendants must actually have committed or directed the acts; instead, it applied *International Shoe*, *Burger King* and *World-Wide Volkswagen* and found that those who "engage[] in unabashedly malignant actions directed at [and] felt in this forum" should "reasonably anticipate being haled into court" in the United States. *Mwani*, 417 F.3d at 12-13 (quotation marks omitted). Providing material support to al Qaeda readily satisfies this standard.

Other courts have followed the D.C. Circuit's rule and are in conflict with the Second Circuit's rule. In *Morris* v. *Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006), for example, the defendant (like the princes here) "provided substantial financial support and personnel assistance to help [al Qaeda] achieve its international terrorism objectives," including encouraging his sons to join. *Id.* at 1327. The court, applying *Mwani*, held that this was a "textbook example[]" of personal jurisdiction under *Calder*'s effects test. *Id.* at 1335-36 ("In terrorism cases ... jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum.") (quotation marks omitted). The court held that such conduct "creates personal jurisdiction even when a defendant did *not* personally participate in the attack itself." *Id.*

at 1336 (emphasis added). "Terrorist attacks require more than a triggerman—they also require financing, planning, and coordinating before a bomb detonates or a plane flies into a building," and thus "personal 'participation in al Qaeda's terrorist agenda'" is sufficient to create jurisdiction over a defendant. *Id.*; see also *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 59 (D.D.C. 2003) (individuals who "conspired" to commit acts of terrorism against foreigners in Africa could "expect they might be haled into the courts of those nations whose citizens would die"); *Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38, 53-54 (D.D.C. 2000) (those who "sponsor terrorism [have] been given adequate warning that terrorist acts against United States citizens, no matter where they occur, may subject them to suit in a United States court").

The Second Circuit purported to distinguish certain of these cases on the ground that they concerned "primary participants in terrorist acts," which the panel defined as someone who perpetrated or "commanded" the act. Pet. App. 41a-42a. Initially, that is simply inaccurate—*Morris*, for example, involved a financier of al Qaeda who did not participate in or "command" the attack. But more importantly, none of the cases cited by the Second Circuit says anything about such a distinction, nor does it appear in any of this Court's personal jurisdiction precedents. Indeed, the D.C. Circuit in *Mwani* (and the district courts in *Morris*, *Pugh*, and *Daliberti*) rejected the argument that only those who actually direct or carry out attacks may be sued in U.S. courts, holding instead that those who "conspire," "sponsor," or in some way "participat[e] in al Qaeda's terrorist agenda," see *supra* at 29-30, should anticipate defending themselves in U.S.

courts. This applies directly to the princes, who are alleged to have materially supported al Qaeda knowing that it would use the support to attack U.S. interests.

C. The United States does, in fact, use enforcement actions in U.S. courts as important tools for combating terrorism and ending terrorists' support, and the Second Circuit's rule limiting jurisdiction over those alleged to have provided extraterritorial support to terrorists has the potential to undermine a broad range of counterterrorism measures.

Criminal and civil prohibitions against the provision of material support for terrorism, including support provided by foreigners abroad, lie at the center of the United States' counterterrorism policies. For example, 18 U.S.C. § 2339B imposes criminal penalties upon "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so," knowing "that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). Congress specifically provided U.S. courts with broad "extraterritorial Federal jurisdiction." *Id.* § 2339B(d). Similarly, the prohibition against financing terrorism imposes criminal penalties upon "[w]hoever ... directly or indirectly, unlawfully and willfully provides or collects funds ... with the knowledge that such funds are to be used ... in order to carry out ... any other act intended to cause death or serious bodily injury to a civilian." *Id.* § 2339C(a)(1)(B). Congress extended jurisdiction over such offenses even when the funding takes place outside the United States if the act "was directed toward or resulted in the carrying out of a predicate act" against U.S. nationals, persons or property within the United

States, or property of U.S. persons or government agencies. *Id.* § 2339C(a)-(b).

Congress also provided a civil remedy to "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism," *id.* § 2333, and intended this provision to extend liability to those whose conduct would fall within the criminal provisions addressing material support to terrorism.[11] See *Boim* v. *Quranic Literacy Inst.*, 291 F.3d 1000, 1012-16 (7th Cir. 2002). Section 2333 imposes liability on those who provide financial support abroad to terrorists and who aid or abet acts of terrorism, as long as "the defendants knew about the organization's illegal activity, desired to help that activity succeed and engaged in some act of helping." *Id.* at 1028. Congress "impose[d] liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts" because "there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence." *Id.* at 1021.

By creating a constitutional barrier to jurisdiction in U.S. courts over those who facilitate but do not directly commit or command acts of terrorism, the Second Circuit sharply limited the scope and enforceability of these and other criminal and civil statutes designed to address financial and other support provided to terrorist organizations. The Second Circuit has held that the Due Process Clause places beyond the reach of federal courts precisely the conduct—material support of terrorism and terrorist organizations—that most threatens the United States

---

[11] Petitioners have expressly pled a cause of action against the respondents under § 2333. Compl. ¶¶ 634-638.

and that the United States government vigorously seeks to prevent and punish.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,

Petitioners,

v.

KINGDOM OF SAUDI ARABIA *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Docket No. 06-0319-cv(L).

In re TERRORIST ATTACKS ON
SEPTEMBER 11, 2001.

Argued: Jan. 18, 2008.
Decided: Aug. 14, 2008.

Before JACOBS, *Chief Judge*, CABRANES, *Circuit Judge*, VITALIANO, *District Judge*.*

DENNIS JACOBS, *Chief Judge*:

The plaintiffs-appellants are persons who incurred losses in the September 11, 2001 terrorist attacks: those who suffered personal injuries, the families and representatives of those who died, insurers and property owners. They have brought tort claims against hundreds of parties: foreign governments, charitable entities, and individuals alleged to have provided financial and logistical support to al Qaeda in the runup to the attacks. Plaintiffs take this appeal from a partial final judgment entered on January 10, 2006 in the United States District Court for the Southern District of New York (Casey, *J.*), dismissing their claims against twelve of the numerous 32 defendants.

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* The Honorable Eric N. Vitaliano of the United States District Court for the Eastern District of New York, sitting by designation.

They have appealed that judgment with respect to seven of the dismissed defendants: the Kingdom of Saudi Arabia ("the Kingdom"), four Saudi princes ("Four Princes"), a Saudi banker ("Mohamed"), and the Saudi High Commission for Relief to Bosnia and Herzegovina ("SHC"). We have jurisdiction over their appeals pursuant to 28 U.S.C. § 1291.

The chief issue on appeal is the scope of foreign sovereign immunity. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"), grants foreign sovereigns immunity from suit in the United States subject to enumerated exceptions. We conclude that the FSIA protects the appellees—most obviously, the Kingdom itself. First, we hold that the FSIA applies to individual officials of foreign governments in their official capacities, and therefore to the Four Princes. Second, we affirm the district court's conclusion that the SHC is an "agency or instrumentality" of the Kingdom, to which the FSIA likewise applies.

Further, we conclude that none of the FSIA's exceptions applies. The plaintiffs' claims do not come within the statutory exception for state-sponsored terrorist acts, 28 U.S.C. § 1605A ("Terrorism Exception"), because the Kingdom has not been designated a state sponsor of terrorism by the United States. As to the exception for personal injury or death caused by a foreign sovereign's tortious act, *id.*§ 1605(a)(5) ("Torts Exception"), we decline to characterize plaintiffs' claims—expressly predicated on a state-sponsored terrorist act—as sounding in tort. Nor do the plaintiffs' claims come within the statutory exception for a foreign sovereign's commercial activity, *id.*§ 1605(a)(2) ("Commercial Activities Exception"), because the defendants' specific alleged

conduct—supporting Muslim charities that promote and underwrite terrorism—is not conduct in trade, traffic or commerce.

Accordingly, we agree with the district court that it lacked subject matter jurisdiction over the claims against the Kingdom, the Four Princes in their official capacities, and the SHC. We likewise affirm the district court's dismissal of the claims against the Four Princes (in their personal capacities) and Mohamed for want of personal jurisdiction, and the denial of the plaintiffs' motions for jurisdictional discovery.

BACKGROUND

The complaints vary somewhat in their details, but they share a core allegation: the defendants played a critical role in the September 11 attacks by funding Muslim charities that, in turn, funded al Qaeda. Since "there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence ," *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1021 (7th Cir.2002), plaintiffs argue that the defendants should be held liable for the consequences of their material support for al Qaeda. The complaints, which we accept as true at the pleading stage, *Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir.2006), allege the facts set forth below.

The SHC[2]

The SHC was formed in 1993 by decree of King Fahd (who was then President of the Council of Min-

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[2] The SHC was named as a defendant in the complaints filed by Federal Insurance, Burnett, Ashton, Cantor, New York Marine and General Insurance Company, World Trade Center Properties and Euro Brokers.

isters, the Kingdom's highest governing body), apparently to support Bosnian Muslims displaced by civil war. The SHC acted as "a fully integrated component of al Qa[e]da's logistical and financial support infrastructure." In the early 1990s, al Qaeda fighters began infiltrating Bosnia disguised as SHC relief workers. The SHC has funneled millions of dollars to al Qaeda, evidenced by investigators' inability "to account for nearly $41 million" in SHC donations. In an October 2001 raid of the SHC's Sarajevo offices, U.S. government officials found computer hard drives containing photos of the World Trade Center, the U.S. embassies in Kenya and Tanzania, and the U.S.S. Cole (all targets of terrorist attacks); documents about pesticides and crop dusters; photos and maps of Washington, D.C. (with prominent government buildings marked); and instructions for fabricating U.S. State Department badges. After the raid, the Bosnian Financial Police reported that peacekeeping forces "confiscated some documentation for which it can be claimed with certainty that it does not belong in the scope of work of a humanitarian organization."

Similar allegations have been lodged against numerous other Muslim charities. Although those claims are not raised in this appeal, the allegations about the charities provide the necessary background for the issues here. The summary allegation is as follows:

> Ostensible charitable organizations, and in particular, Islamic charities under the control of the Kingdom of Saudi Arabia, have played a singularly important role in al Qa[e]da's development and pursuit of its perverse ambitions. These "charities" have served as the primary vehicle for raising, laundering and distributing funds on be-

> half of al Qa[e]da from its inception. In addition, these charities have provided arms, false travel documentation, physical assets and logistical support to al Qa[e]da.

These allegations include a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda. The United States government has listed several of the charities (or their branch offices) as "Specifically Designated Global Terrorists," and has taken steps to shut down their operations.

The Kingdom of Saudi Arabia[3]

The Kingdom contributed to the terrorist-linked charities described above and closely monitored their relief efforts abroad, with the express knowledge that those charities were funneling the Kingdom's funds to al Qaeda. According to the Federal Insurance Plaintiffs, the Kingdom exercises complete oversight and control over the charities, making the charities alter-egos and agents whose deeds can be imputed to the Kingdom.

The Four Princes[4]

The Four Princes are: His Royal Highness Prince Salman bin Abdulaziz al-Saud ("Prince Salman"), His

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[3] The Kingdom is named as a defendant in the complaints filed by Federal Insurance, Vigilant, Cantor, New York Marine, O'Neill and Pacific Employers.

[4] Princes Sultan and Turki are named as defendants in the complaints filed by Ashton, Burnett, Cantor, Continental Casualty, Euro Brokers, Federal Insurance, New York Marine and World Trade Center Properties. Princes Salman and Naif are named as defendants in the Ashton, Burnett, Cantor and Federal complaints.

Royal Highness Crown Prince Sultan bin Abdulaziz al-Saud ("Prince Sultan"), His Royal Highness Prince Naif bin Abdulaziz al-Saud ("Prince Naif"), and His Royal Highness Prince Turki al Faisal bin Abdulaziz al-Saud ("Prince Turki"). Broadly stated, it is alleged that they caused money to be given to the Muslim charities (from the Kingdom as well as their own accounts), with the knowledge that the charities would transfer the funds to al Qaeda.

Princes Naif, Sultan and Turki sit on the Kingdom's Supreme Council of Islamic Affairs, which monitors and approves Islamic charitable giving both within and outside the Kingdom. (The Kingdom generally requires Saudis to obtain government approval for private charitable giving abroad.)

Prince Salman is President of the SHC and Governor of Riyadh Province. He intended that the SHC would be a conduit for funding and supporting the Bosnian Islamic movement, including al Qaeda. Prince Salman was put on notice of SHC's connection with al Qaeda by a letter he received in 2000 from a group called the "Mothers of Srebrenica" complaining that the SHC's money was not being used for humanitarian aid in Bosnia.

Prince Sultan is Chairman of the Supreme Council and First Deputy President of the Council of Ministers. He has been designated as the successor to King Abdullah. Sultan received at least three warnings that the Muslim charities were al Qaeda fronts.[5]

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[5] [1] At a November 1994 meeting with Princes Sultan and Naif, French Interior Minister Charles Pasqua "raised the question of financial aid furnished by Saudi charitable organizations enjoying state support, in particular the World Islamic League, to Islamist movements or terrorist groups . . . insofar as the Islamist groups receiving this aid were likely to

Prince Sultan also made personal contributions to the charities. According to a 1996 report in a Muslim newspaper, he donated one million Saudi dollars to one of the charities pursuant to an annual pledge. Sultan also made a sizable contribution to the Saudi Joint Relief Committee of Kosovar Refugees ("SJRC"), which oversees several other Muslim charities.

Prince Naif is Saudi Minister of the Interior, in which capacity he monitors and controls the charities that operate in Saudi Arabia. At one time, Naif served as the General Supervisor of the SJRC. Prince Naif was present with Prince Sultan when he was warned that Saudi charities serve as fronts for terrorist groups. Naif has personally contributed more than two million Saudi dollars to the SJRC, and has helped the SJRC raise money from other wealthy Saudis.

Prince Turki was the director of the Kingdom's Department of General Intelligence ("DGI") until August 2001. In the 1980s, Turki met Osama bin Laden at the Saudi embassy in Islamabad, Pakistan; he later met with bin Laden at least five times in the 1980s and 1990s. In 1998, Turki agreed with the Taliban and al Qaeda that the Kingdom would not attempt to extradite bin Laden or his followers, in re-

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damage French interests or had already done so in the past"; [2] at a 1999 meeting between U.S. representatives and the "Finance Ministry, intelligence, and law enforcement officials in Saudi Arabia," the United States put Saudi Arabia and the United Arab Emirates on notice of its intent to apply "pressure to deal effectively with those who fund terrorism," and soon thereafter, Sultan visited the White House to discuss terrorism issues; and [3] in 1997, Sultan joined an anti-terrorism initiative with the United States.

turn for bin Laden's agreement not to target the Kingdom or its royal family. During Turki's tenure, there existed "near identity" between DGI and the Taliban. The Federal Plaintiffs allege in addition that Turki donated to the charities in his personal capacity.

Prince Mohamed[6]

The plaintiffs' claims against Mohamed, His Royal Highness Prince Mohamed al Faisal al Saud, focus on his role in Islamic banking.[7] Osama bin Laden and other terrorists held accounts at banks (and subsidiaries of banks) managed by Mohamed; those banks are governed by Islamic law, or sharia, which prohibits interest; instead, the banks and their depositors manage the funds jointly. It is alleged that Mohamed knowingly provided material sponsorship to international terrorism.

Procedural History

The Burnett Plaintiffs filed suit against Princes Sultan and Turki (and other defendants not present in this appeal) in the United States District Court for the District of Columbia. The district court (Robertson, *J.*), dismissed the claims brought against Princes Sultan and Turki in their official capacities for lack of subject matter jurisdiction, and the claims against Prince Sultan in his personal capacity for lack of personal jurisdiction. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F.Supp.2d 9 (D.D.C.2003).

---

[6] Prince Mohamed is named as a defendant in the complaints filed by Ashton, Burnett, Cantor, Continental Casualty, Euro Brokers, Federal Insurance, New York Marine, O'Neill and World Trade Center Properties.

[7] Unlike the Four Princes, Prince Mohamed is not a government official of the Kingdom.

On December 9, 2003, the Judicial Panel on Multidistrict Litigation transferred *Burnett* to the United States District Court for the Southern District of New York as MDL 1570 to be consolidated for pretrial purposes with other similar cases. The consolidated proceeding was assigned to the late Judge Richard Conway Casey.

On January 18, 2005, Judge Casey dismissed the consolidated claims against the Kingdom, Princes Sultan and Turki, and Mohamed. *In re Terrorist Attacks on Sept. 11, 2001,* 349 F.Supp.2d 765 (S.D.N.Y.2005)(*"In re Terrorist Attacks I"*). Citing the majority view among the circuits, Judge Casey concluded that the FSIA shields Princes Sultan and Turki in their official capacities. (The plaintiffs do not dispute that the FSIA protects the Kingdom as a foreign sovereign.) Judge Casey further held that no exception to the FSIA defeated the defendants' sovereign immunity.

Judge Casey likewise dismissed the claims against Princes Sultan and Turki (in their personal capacities) and against Mohamed for lack of personal jurisdiction. Judge Casey reasoned that the plaintiffs had failed to "offer any facts to lend support to their allegation that Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism." *In re Terrorist Attacks I,* 349 F.Supp.2d at 813. Similarly, the Federal Plaintiffs failed to present "any specific facts from which this Court could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda. Conclusory allegations that he donated money to charities, without specific factual allegations that he knew they were funneling money to terrorists, do not

suffice." *Id.* at 813-14. Finally, there was no allegation "that Prince Mohamed had any knowledge or involvement in any al Qaeda accounts at any of the banks he chaired"; and his connection to the Sudanese bank "which purportedly knowingly opened accounts for al Qaeda operatives, including Osama bin Laden, is too remote in time and proximity to implicate" him. *Id.* at 816.

On May 5, 2005, the district court entered an order dismissing the claims against the Kingdom, Princes Sultan and Turki, and Mohamed in the remaining consolidated cases. (The plaintiffs conceded that the allegations and evidence in the other consolidated cases against those four defendants did not materially differ from the allegations in the cases already dismissed.)

In an opinion and order issued on September 21, 2005, the district court dismissed the Ashton, Burnett and Federal Plaintiffs' claims against Princes Salman and Naif and the SHC on substantially the same grounds. The court concluded that the SHC is an agency of the Kingdom entitled to immunity under the FSIA, and that subject matter jurisdiction was therefore lacking over the claims against the SHC and Princes Salman and Naif (in their official capacities). The claims against Princes Salman and Naif in their personal capacity were dismissed for lack of personal jurisdiction. *In re Terrorist Attacks on Sept. 11, 2001*, 392 F.Supp.2d 539 (S.D.N.Y.2005)("*In re Terrorist Attacks II*").

On December 16, 2005, the district court certified as "final" the orders of January 18, 2005 and September 21, 2005, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, with respect to the Kingdom; Princes Sultan, Turki, Salman and Naif;

Mohamed and the SHC.[8] By virtue of the December 16, 2005 certification, this Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

DISCUSSION

"The standard of review applicable to district court decisions regarding subject matter jurisdiction under the FSIA is clear error for factual findings and *de novo* for legal conclusions." *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001) (quoting *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 150-51 (2d Cir.2001) (internal quotation marks omitted)). The same standards apply to decisions on personal jurisdiction. *Sunward Electronics, Inc. v. McDonald,* 362 F.3d 17, 22 (2d Cir.2004). We review a district court's decision to deny jurisdictional discovery for abuse of discretion. *Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 255 (2d Cir.2007).

I

"[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). *See also Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983) (stating that the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity"

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[8] Per stipulation, the plaintiffs with claims pending against Princes Salman and Naif will be bound by any appellate decision on the district court's dismissals.

(citing 28 U.S.C. § 1330(a))); *Cabiri v. Gov't of Republic of Ghana,* 165 F.3d 193, 196 (2d Cir.1999) ("The FSIA is the sole source for subject matter jurisdiction over any action against a foreign state."). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); 28 U.S.C. § 1604 (making foreign states "immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"). Potentially relevant here are the exceptions for torts, terrorism, and commercial activities. 28 U.S.C. §§ 1605(a)(5), 1605A, 1605(a)(2).

"Under the FSIA, . . . personal jurisdiction equals subject matter jurisdiction plus valid service of process." *Shapiro v. Republic of Bolivia,* 930 F.2d 1013, 1020 (2d Cir.1991). *See* 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title."). Of course, "the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant." *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria,* 647 F.2d 300, 308 (2d Cir.1981).

In a motion to dismiss for lack of subject matter jurisdiction under the FSIA, the defendant must present a "*prima facie* case that it is a foreign sovereign."

Virtual Countries, Inc. v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir.2002) (internal quotation marks omitted). The plaintiff then "has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted." *Cargill Intern. S.A. v. M/T PAVEL DYBENKO*, 991 F.2d 1012, 1016 (2d Cir.1993). "Determining whether this burden is met involves a review [of] the allegations in the complaint, the undisputed facts, if any, placed before [the court] by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—[resolution of] disputed issues of fact.'" *Virtual Countries*, 300 F.3d at 241 (quoting *Robinson*, 269 F.3d at 141 (alterations in original and internal quotation marks omitted)). The "ultimate burden of persuasion remains with the alleged foreign sovereign." *Cargill*, 991 F.2d at 1016 (quoting *Robinson*, 269 F.3d at 141 (internal quotation marks omitted)).

II

This Circuit has not yet decided whether the FSIA protects an individual official of a foreign government acting in his official capacity. *See Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147, 160, 161 (2d Cir.2007) (acknowledging that "it is an open question in this circuit whether individual officials enjoy sovereign immunity under the FSIA," and remanding for the district court "to address in the first instance . . . under what circumstances, if any, the FSIA applies to individuals"); *Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir.2004) (expressing in dicta "some doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity, which generally entailed deference to the executive branch's

suggestions of immunity"); *In re Doe,* 860 F.2d 40, 45 (2d Cir.1988) ("Because the FSIA makes no mention of heads-of-state, their legal status remains uncertain.").

A

We join our sister circuits in holding that an individual official of a foreign state acting in his official capacity is the "agency or instrumentality" of the state, and is thereby protected by the FSIA. *See Velasco v. Gov't of Indonesia,* 370 F.3d 392, 399 (4th Cir.2004) ("Claims against the individual in his official capacity are the practical equivalent of claims against the foreign state."); *Keller v. Cent. Bank of Nigeria,* 277 F.3d 811, 815 (6th Cir.2002) ("[N]ormally foreign sovereign immunity extends to individuals acting in their official capacities as officers of corporations considered foreign sovereigns."); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.,* 182 F.3d 380, 388 (5th Cir.1999) (same); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1027 (D.C.Cir.1997) ("Individuals acting in their official capacities are considered 'agenc[ies] or instrumentalit[ies] of a foreign state;' these same individuals, however, are not entitled to immunity under the FSIA for acts that are not committed in an official capacity."); *Chuidian v. Philippine Nat'l Bank,* 912 F.2d 1095, 1101-03 (9th Cir.1990) ("We thus join the majority of courts which have similarly concluded that section 1603(b) can fairly be read to include individuals sued in their official capacity."). Several district judges in this Circuit have reached the same conclusion. *See, e.g., Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah,* 184 F.Supp.2d 277, 286-87 (S.D.N.Y.2001) (Lynch, *J.*); *Tannenbaum v. Rabin,* 1996 WL 75283,

at *2 (E.D.N.Y. Feb. 13, 1996) (Glasser, *J.*); *Bryks v. Canadian Broad. Corp.*, 906 F.Supp. 204, 210 (S.D.N.Y.1995) (Mukasey, *J.*); *Kline v. Kaneko*, 685 F.Supp. 386, 389 n. 1 (S.D.N.Y.1988) (Ward, *J.*).

The Seventh Circuit is an outlier. It has construed the FSIA's grant of immunity narrowly, to exclude individual government officials, reasoning that "[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms." *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir.2005).

B

"[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962. Until the 1950s, the judiciary "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id.* In 1952, the State Department issued the "Tate Letter,"[9] which "announced [the] adoption of the 'restrictive' theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487, 103 S.Ct. 1962. The Ninth Circuit described the scheme of the Tate Letter as follows:

> Typically, a foreign state or instrumentality faced with a suit in a court in our country would

[9] Jack B. Tate was then Acting Legal Adviser of the Department of State.

> apply to the State Department for a finding of immunity. The State Department would make a determination, considering the common law principles expressed in the Restatement, and would convey the finding to the relevant court by filing a "suggestion." In fact, however, the courts treated such 23 "suggestions" as binding determinations, and would invoke or deny immunity based upon the decision of the State Department.

Chuidian, 912 F.2d at 1100. But by the 1970s, some in Congress had grown concerned that the Tate Letter system was "leaving immunity decisions subject to diplomatic pressures rather than to the rule of law." *Id.*

The FSIA, enacted in 1976, "largely codifl[ied] the existing common law of sovereign immunity," with the notable exception that it "remove[d] the role of the State Department in determining immunity." *Id.*; *see also* H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 ("House Report") ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).").

Recognizing "the potential sensitivity of actions against foreign states," the FSIA "aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Cargill*, 991 F.2d at 1016 (internal citation and quotation marks omitted).

The FSIA defines "foreign state" as follows:

> (a) "foreign state". . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a), (b).

C

Several plaintiffs read "state," as used in the FSIA, as a term of art meaning "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." *Restatement (Third) of Foreign Relations Law* § 201 (1987). This definition necessarily excludes individual government officials. Nor, argue these plaintiffs, can an official be considered an "agency or instrumentality" of a state, because the entities listed in the subclauses of § 1603(b) are "defined in terms not usually used to describe natural persons." *Tachiona*, 386 F.3d at 221.

Writing as *amicus curiae* in another FSIA lawsuit, the Department of Justice has opined that the FSIA, with its exclusions and obscurities, stops short of shielding government officials, who instead enjoy an expansive common law immunity.[10] Because we decide this case on the ground that the FSIA protects individual government representatives in their official capacities, we need not consider any continuing vitality of sovereign immunity under the common law.

The Ninth Circuit's opinion in *Chuidian* is the most detailed statement of the majority view that an individual official is an "agency or instrumentality" of a foreign government. As *Chuidian* observes, the "terms 'agency,' 'instrumentality,' 'organ,' 'entity,' and 'legal person,' while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals." *Chuidian*, 912 F.2d at 1101. Moreover, the FSIA's "legislative history does not even hint of an intent to exclude individual officials," but does contain "numerous statements [suggesting] that Congress intended the Act to codify the existing common law principles of sovereign immunity." *Id.* Prior to the FSIA's passage, those principles "expressly extended immunity to individual officials acting in their official capacity." *Id.*; *see also Restatement (Second) of Foreign Relations Law* § 66(f) (1965) ("The immunity of a foreign state . . . extends to . . . any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of

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[10] In a letter filed pursuant to Fed. R.App. P. 28(j), the Four Princes submitted the *amicus* brief of the Department of Justice from *Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147, 160 (2d Cir.2007).

exercising jurisdiction would be to enforce a rule of law against the state."). As a consequence, if the FSIA did not extend to individuals, it would represent "a substantial unannounced departure from prior common law." *Chuidian*, 912 F.2d at 1101. This is so because, after the FSIA's passage, the Restatement (Third) of Foreign Relations Law "delete[d] in its entirety the discussion of the United States common law of sovereign immunity, and substitute[d] a section analyzing issues exclusively under the [FSIA]." *Id.* at 1103. Insofar as this revision marks the recognition that we now look to the FSIA where we once sought guidance from the common law, we would expect a departure from the prior common-law rule to be made explicitly, not *sub silentio*.

The Ninth Circuit rejected the view, advanced by the Department of Justice, that the foreign state is protected by the FSIA while its officials are otherwise protected by common law immunity. Under that approach, "presumably . . . [courts] would once again be required to give conclusive weight to the State Department's determination of whether an individual's activities fall within the traditional exceptions to sovereign immunity," which would run "counter to Congress's stated intent of removing the discretionary role of the State Department." *Id.* at 1102.

We join the majority of Circuits in holding that the FSIA grants immunity to individual officials of a foreign government for their official-capacity acts, and we subscribe to the reasoning of *Chuidian*.

That analysis, largely based on legislative history, is grounded in the statutory wording. The term "agency" has a more abstract common meaning than a governmental bureau or office: an agency is any thing or person through which action is accom-

plished. We need not decide how broadly to construe this word in other contexts; however, it is easily open enough to include senior members of a foreign state's government and secretariat.

This reading of "agency" is consistent with the evident principle that the state cannot act except through individuals. Thus, the act-of-state doctrine precludes our courts from sitting in judgment "on the acts of the government of another done within its own territory," including acts committed by individual officials of foreign governments. *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 451 (2d Cir.2000) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897)). This is so because "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir.1895), *aff'd* 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897); *see also Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (concluding that the action of a "duly commissioned military commander" of the Mexican government "[p]lainly . . . was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen"). Similarly, "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In other words, a claim against an agency of state power, including a state officer acting in his official capacity, can be in effect a claim against the state. In other contexts as well, the law recognizes that the immunity of a principal does not amount to much without the extension of that immunity to its agents. *See, e.g., Gravel v. United States*, 408 U.S. 606, 616-

17, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) (treating as one a Senator and his aides for purpose of legislative immunity; "if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated" (internal citation omitted)); *Oliva v. Heller,* 839 F.2d 37, 40 (2d Cir.1988) (reasoning that because "law clerks are simply extensions of the judges at whose pleasure they serve . . . for purposes of absolute judicial immunity, judges and their law clerks are as one" (internal citation and quotation marks omitted)).

This conclusion finds reinforcement in the new iteration of the Terrorism Exception, which makes specific reference to the legal status of "an official, employee or agent" of the foreign state. *See* 28 U.S.C. § 1605A(a)(1) (lifting immunity in connection with, *inter alia,* the "provision of material support or resources . . . by an official, employee, or agent of [a] foreign state while acting within the scope of his or her office, employment, or agency"); *id.* at (c) (creating private right of action against a "foreign state that is or was a state sponsor of terrorism . . . , and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency"). These provisions evince congressional recognition that claims against individual officials of a foreign government must be brought within the confines of the FSIA. Individuals and government officers, as non-state entities, cannot be designated "state sponsor[s] of terrorism." So that such individuals would nevertheless fall within the scope of the Terrorism Exception to FSIA immunity, Congress enacted specific provisions that defined the exception to reach these individuals. If these

individuals were not otherwise immune from suit pursuant to the FSIA, these provisions would be entirely superfluous. We can thus infer that Congress considered individuals and government officers to be within the scope of the FSIA. Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," the Terrorism Exception suggests that Congress has long contemplated the FSIA's application to individuals. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). In light of those considerations, we hold that the FSIA treats individual agents of the foreign state, when they undertake their official duties, as the "foreign state" for the purposes of 28 U.S.C. § 1603.

III

The Burnett Plaintiffs challenge the district court's conclusion that the SHC is an "agency or instrumentality" of the Kingdom and therefore entitled to immunity under the FSIA. 28 U.S.C. § 1603(a).

To recap, an "agency or instrumentality of a foreign state" is any entity

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b).

The question is whether the SHC is an "organ" of the Kingdom. 28 U.S.C. § 1603(b)(2). There is no definition of that word in the FSIA; however, criteria can be found:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir.2004) (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir.2000)). *See also USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir.2003) (considering the five *Filler* factors, along with "the level of government financial support" and "the ownership structure of the entity"). We agree that "*Filler* invites district courts to engage in a balancing process, without particular emphasis on any given factor and without requiring that every factor weigh in favor of, or against, the entity claiming FSIA immunity." *Murphy v. Korea Asset Mgmt. Corp.*, 421 F.Supp.2d 627, 641 (S.D.N.Y.2005) (Holwell, *J.*).

To support its status as an organ of the Kingdom, the SHC submitted declarations from Saud bin Mohammad Al Roshood, Director of the Executive Office of SHC, and Dr. Mutlib bin Abdullah Al-Nafissa, a member of the Council of Ministers authorized to speak on the SHC's behalf.

Al-Roshood explains that, during and after the civil war in Bosnia,

> there was much interest within the Kingdom of Saudi Arabia, both among citizens and the government, in supporting charitable projects in Bosnia-Herzegovina. The Kingdom of Saudi Arabia desired to "speak with one voice" as a nation . . . The [SHC] was therefore formed to centralize all charitable giving from the Kingdom to Bosnia-Herzegovina. When formed, the [SHC] was vested with the sole authority to collect and distribute charitable funds in Bosnia.

Al-Roshood states that many SHC employees are seconded from the Kingdom's ministries or agencies, which continues paying their salaries. Other employees are on contract with the SHC, and are paid by the SHC.

Al-Nafissa explains that the Council of Ministers created the SHC in 1993, pursuant to its authority (under Council law) "to order the formation of a governmental entity." The same order appointed Prince Salman as SHC's president. Al-Nafissa avers that "a government commission, such as the [SHC], always is chaired or presided over by a governmental official and conducts its affairs in accordance with the domestic or foreign policy objectives of the Kingdom," and "can be sued for [its] administrative acts in the Board of Grievances, the administrative court of Saudi Arabia."

Based on this undisputed record, the *Filler* factors indicate that the SHC is an organ of the Kingdom. The SHC was created for a national purpose (channeling humanitarian aid to Bosnian Muslims); the Kingdom actively supervises it; many SHC workers

are Kingdom employees who remain on the Kingdom's payroll; the SHC holds the "sole authority" to collect and distribute charity to Bosnia; and it can be sued in administrative court in the Kingdom.

The Burnett Plaintiffs note the paucity of information about the SHC's ownership structure (a factor identified by the Third Circuit in *USX Corp)*, and argue that the district court gave this insufficient weight. We do not see the relevance of this factor here: The SHC is a non-corporate governmental entity that, like numerous agencies within our own government, has no owners or shareholders.

Nor are we persuaded that the SHC waived its immunity by identifying itself as "nongovernmental" on a registration document filed with Bosnian authorities. "We and other courts have observed that 'the implied waiver provision of Section 1605(a)(1) must be construed narrowly.'" *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 243 (2d Cir.1996) (quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir.1991)). *See also Cabiri*, 165 F.3d at 202 (declining to find waiver where defendant had "taken no action that can be understood to demonstrate either an objective or a subjective intent to waive immunity with respect to [plaintiffs'] claims"); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir.1985) (explaining that "waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so"). Registering as a humanitarian organization in Bosnia does not reflect a conscious decision by the SHC to waive its sovereign immunity in American courts. The SHC's outside legal counsel in Bosnia avers that the term "nongovernmental" on the regis-

tration documents refers to whether the humanitarian organization is part of the government of Bosnia, and that "[t]here is no prohibition against humanitarian organizations that are part of foreign governments operating in Bosnia-Herzegovina."

IV

We next consider the plaintiffs' arguments about the applicability of two exceptions to the FSIA: the Torts Exception and the Commercial Activities Exception.[11]

The FSIA lifts immunity for certain torts committed by foreign sovereigns:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (5) not otherwise encompassed in paragraph (2) above,[12] in which money damages are

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[11] Because we conclude that no exception lifts the FSIA's protection of the Kingdom and the SHC, we do not reach the Federal Plaintiffs' argument that the actions of the SHC and other charities should be imputed to the Kingdom for FSIA purposes. The World Trade Center Plaintiffs argue that a foreign state without immunity has no Due Process rights that limit the Court's exercise of personal jurisdiction over it. *But see Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir.1991) ("There must be sufficient 'minimum contacts' between the foreign state and the forum 'such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945))). We likewise need not reach that argument.

[12] Paragraph (2) is the Commercial Activities Exception. *See* Section V, *infra*

> sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> > (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
> >
> > (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605. Congress enacted the Torts Exception "to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *see also MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C.Cir.1987) ("[A]lthough cast in general terms, the 'tortious act' exception was designed primarily to remove immunity for cases arising from traffic accidents. This is scarcely to say that the exception applies *only* to traffic accidents; rather, the point is that the legislative history counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law." (internal citations omitted)); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C.Cir.1984) (Scalia, *J.*) ("The primary

purpose of the 'tortious act or omission' exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business.").

The plaintiffs allege that the defendants' tortious conduct took the form of providing material support to terrorists. A different statutory exception—the Terrorism Exception—governs precisely those activities. The Terrorism Exception (with some ellipses) is set out in the margin.[13]

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[13] (a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was desig-

nated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration;

. . . .

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official,

Congress enacted the first iteration of the Terrorism Exception in 1996 in order to "give American citizens an important economic and financial weapon against . . . outlaw states" that sponsor terrorism by providing "safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like." H.R. Rep. No. 104-383, at 62 (1995). An FSIA exception for terrorist acts "had

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employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

. . . .

(h) DEFINITIONS.—For purposes of this section—

. . . .

(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism . . .

28 U.S.C § 1605A. On January 28, 2008, while this appeal was pending, the Terrorism Exception was superseded and replaced. *See* Pub.L. No. 110-181 (2008). The panel solicited and the parties provided letter briefs addressing what impact, if any, this change in the law has on this case.

long been sought by victims' groups," but it "had been consistently resisted by the executive branch," which feared that such an amendment to the FSIA "might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States." *Price v. Socialist People's Libyan Arab Jamahiriya,* 294 F.3d 82, 89 (D.C.Cir.2002). The resulting provision, 28 U.S.C. § 1605(a)(7) (repealed 2008) bore "notable features which reveal the delicate legislative compromise out of which it was born," the primary one being that it applied only to designated state sponsors of terrorism. *Id.* When Congress amended the Terrorism Exception in 2008, that limitation was preserved. 28 U.S.C. § 1605A(a)(2)(A)(i)(I) ("requiring that the foreign state have been "designated as a state sponsor of terrorism" by the State Department").

The State Department has never designated the Kingdom a state sponsor of terrorism. As a consequence, the Terrorism Exception is inapplicable here. No plaintiff argues otherwise. But to apply the Torts Exception where the conduct alleged amounts to terrorism within the meaning of the Terrorism Exception would evade and frustrate that key limitation on the Terrorism Exception.

By definition, the acts listed in the Terrorism Exception are torts. If the Torts Exception covered terrorist acts and thus encompassed the conduct set forth in the Terrorism Exception, there would be no need for plaintiffs ever to rely on the Terrorism Exception when filing suit. An important procedural safeguard—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated. We decline to read the statute in a way that

would deprive the Terrorism Exception (or its limitations) of meaning. *Williams v. Taylor,* 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) ("It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." (internal citation and quotation marks omitted)). To assure that the FSIA serves its purpose, its exceptions must be separately administered.

We and our sister circuits have repeatedly rejected efforts to shoehorn a claim properly brought under one exception into another. *See, e.g., Garb v. Republic of Poland,* 440 F.3d 579, 588 (2d Cir.2006) (declining to credit plaintiffs' invocation of the Commercial Activities Exception, which "simply recharacterize[d] plaintiffs' 'takings' argument"); *Chuidian,* 912 F.2d at 1106 ("To hold otherwise would be to allow plaintiffs to escape the requirements of section 1605(a)(3) through artful recharacterization of their takings claims."); *de Sanchez v. Banco Cent. de Nicaragua,* 770 F.2d 1385, 1399 (5th Cir.1985) ("Because [the plaintiff's] claim for conversion is in essence a property rather than a tort claim, we hold that [the Torts Exception] does not apply."); *Alberti v. Empresa Nicaraguense De La Carne,* 705 F.2d 250, 254 (7th Cir.1983) ("The basis of this lawsuit is the nationalization of Empacadora, which is a quintessential Government act. Plaintiffs cannot transform this governmental dispute into a commercial dispute through the simple expedient of attempting to offset an unrelated commercial debt." (internal citations omitted)).

Plaintiffs' textual argument focuses on the feature of the Torts Exception that reinstates foreign sovereign immunity for a particular class of torts: malicious prosecution, abuse of process, libel, slander,

misrepresentation, deceit and interference with contract rights. 28 U.S.C. § 1605(a)(5)(B). The plaintiffs contend that if Congress intended to do the same for "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources," 28 U.S.C. § 1605A, it could have done so explicitly. *Cf. Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). But the Terrorism Exception applies "in any case not otherwise covered by this chapter." 28 U.S.C. § 1605A(a)(1). In other words, the Terrorism Exception stands alone. If acts of terrorism are considered torts for the purposes of the Torts Exception, then any claim that could be brought under the Terrorism Exception could also be brought under the Torts Exception. If this were so, the Terrorism Exception would be drained of all force because every potential case would be "otherwise covered by this chapter"—namely, the Torts Exception. So, claims based on terrorism must be brought under the Terrorism Exception, and not under any other FSIA exception.

The plaintiffs predict that several untoward consequences will flow from reading the Torts Exception not to cover their claims. Some of these concerns have been remedied by the amended version of the Terrorism Exception, as explained in the margin.[14] The

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[14] For instance, the Vigilant Plaintiffs protested that the prior version of the Terrorism Exception would leave those who suffered property damage without means of recovery. The amended version solves that problem—it provides federal jurisdiction and a private cause of action "for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies" as a consequence of state-sponsored terrorism. 28 U.S.C. § 1605A(d). Moreover, the amended version of the

remainder overlook what is at stake here: civil liability. That a foreign sovereign is immune to civil claims brought by the victims of its alleged wrongdoing does not mean it has unfettered discretion to commit atrocities against United States nationals. Deterrence (or punishment) does not begin and end with civil litigation brought by individual plaintiffs. Our government has other means at its disposal—sanctions, trade embargos, diplomacy, military action—to achieve its foreign policy goals and to deter (or punish) foreign sovereigns. Although the FSIA did open an avenue of redress for certain individual victims of state-sponsored terrorism, it did not delegate to the victims, their counsel and the courts the responsibility of the executive branch to make America's foreign policy response to acts of terrorism committed by a foreign state, including whether federal courts may entertain a victim's claim for damages.

We therefore hold that the Torts Exception does not apply here.[15]

Terrorism Exception expands the class of claimants beyond United States nationals to members of our armed forces and employees of our government. 28 U.S.C. § 1605A(a)(2)(A)(i)(II), (III).

[15] The defendants raise three other challenges to the application of the Torts Exception: since the Torts Exception is limited to torts that are both committed and felt within the United States, it does not concern a tortious act committed abroad, even if it has effects on United States soil; the "discretionary function" exclusion to the Torts Exception reinstates sovereign immunity; and, for lack of causation, the plaintiffs fail to state a claim in tort in any event. Because we hold that the Torts Exception does not apply to the plaintiffs' allegations, it is unnecessary to reach these additional arguments.

V

The Federal Plaintiffs characterize the defendants' charitable contributions as a form of money laundering, argue that money laundering is commercial in nature, and ask us to conclude that the Commercial Activities Exception defeats the defendants' immunity for harm caused by their charitable contributions. The same analysis that renders inapplicable the Torts Exception likewise defeats this argument. *See* Part IV. Moreover, existing authorities make clear that the Commercial Activities Exception does not apply here.

The FSIA's Commercial Activities Exception defeats foreign sovereign immunity in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). "Commercial activity' is defined as "a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The next sentence advises that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* The Supreme Court has criticized the circularity of this definition, which

> leaves the critical term "commercial" largely undefined: The first sentence simply establishes

> that the commercial nature of an activity does not depend upon whether it is a single act or a regular course of conduct; and the second sentence merely specifies what element of the conduct determines commerciality *(i.e.,* nature rather than purpose), but still without saying what "commercial" means.

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). *See also Saudi Arabia v. Nelson,* 507 U.S. 349, 359, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) ("If this is a definition, it is one distinguished only by its diffidence.").

Happily, "the FSIA was not written on a clean slate." *Weltover,* 504 U.S. at 612, 112 S. Ct. 2160. Rather, it codified the "restrictive" theory of foreign sovereign immunity used by the State Department between 1952 and the passage of the FSIA in 1976. In a case decided in that era, the Supreme Court explained (without disagreement from the dissenters) that "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens." *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 704, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). The Supreme Court adhered to this standard in construing the FSIA: "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover,* 504 U.S. at 614, 112 S.Ct. 2160; *see also Letelier v. Republic of Chile,* 748 F.2d 790, 796, 797 (2d Cir.1984) ("*Letelier II*") (inquiring into "whether the activity is of the type an individual would

customarily carry on for profit," or that of a "merchant in the marketplace"). The FSIA asks

> not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 504 U.S. at 614, 112 S.Ct. 2160 (citing Black's Law Dictionary 270 (6th ed.1990)). So, regulation of "foreign currency exchange is a sovereign activity . . . whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.* at 614-15, 112 S.Ct. 2160. In the same way, "a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature," because "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce."[16] *Nelson,* 507 U.S. at 361-62, 113 S.Ct. 1471.

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[16] The House Report provides additional examples:

> [A] contract by a foreign government . . . to construct a government building . . . [or] to make repairs on an embassy building . . . should be considered to be commercial contracts, even if their ultimate object is to further a public function. By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity.

House Report at 16.

With this distinction in mind, "our first task is to identify what particular conduct in this case is relevant." *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria,* 647 F.2d 300, 308 (2d Cir.1981); *see also Nelson,* 507 U.S. at 356, 113 S.Ct. 1471 ("We begin our analysis by identifying the particular conduct on which the [plaintiffs'] action is 'based' for purposes of the Act."). The Federal Plaintiffs focus on what they term "the sovereign defendants' money laundering activities on behalf of al Qa[e]da," and argue that the law draws no bright line between "commercial" activities that are legitimate and those that are criminal. We understand the Federal Plaintiffs' argument to be as follows: the defendants donated money to charities with the intent that it be funneled to terrorist organizations which, in turn, would use that money to purchase the plane tickets, communications devices and weapons necessary to orchestrate the September 11 attacks.

This argument fails because "it goes to purpose, the very fact the Act renders irrelevant to the question of an activity's commercial character." *Nelson,* 507 U.S. at 363, 113 S.Ct. 1471. It does not matter that the defendants made (and oversaw) donations to charities with a specific intent as to where those donations would end up. The alleged conduct itself—giving away money—is not a commercial activity. Granted, donating to charities is among "'those powers that can also be exercised by private citizens,'" *Alfred Dunhill,* 425 U.S. at 704, 96 S.Ct. 1854,—unlike (say) "participation in a foreign assistance program administered by the Agency for International Development . . . whose essential nature is public or governmental," House Report at 16. But inquiry under the Commercial Activities Exception is not just whether the act was public (*jure imperii*) or private (*jure ges-*

tionis); it also matters "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover,* 504 U.S. at 614, 112 S.Ct. 2160. In this context, the Four Princes' donations to charity are not part of the trade and commerce engaged in by a "merchant in the marketplace." *Letelier II,* 748 F.2d at 796. Consequently, the Commercial Activities Exception does not apply.[17]

VI

The remaining issue is the district court's personal jurisdiction over the Four Princes in their personal capacities, and over Prince Mohamed (who is sued in no other capacity). The plaintiffs have the burden of showing that these individuals have "certain minimum contacts with [the United States] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (internal quotation marks omitted). *See Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir.1999) (where the defendants have moved to dismiss for lack of personal jurisdiction, "the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant"); *Metro. Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 566 (2d Cir.1996) (same). "In determining whether a plaintiff has met this burden, we will not draw 'argumentative inferences' in the

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[17] As we conclude that the defendants' conduct falls outside the FSIA's definition of "commercial activity," we need not consider whether a criminal act (*e.g.*, money laundering) can ever be considered commercial for purposes of the FSIA.

plaintiff's favor." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994) (quoting *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir.1992)). Moreover, "we are not bound to accept as true a legal conclusion couched as a factual allegation." *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir.1998) (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)).

Due process mandates that a defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The "'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). Put differently, personal jurisdiction is proper where the defendant took "intentional, and allegedly tortious, actions . . . expressly aimed" at the forum state. *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984); *see also In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208 (2d Cir.2003) (citing *Calder* for proposition that a "court may exercise personal jurisdiction over defendant consistent with due process when defendant is a primary participant in intentional wrongdoing—albeit extraterritorially—expressly directed at forum"). Mere foreseeability of

harm in the forum state is insufficient. *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174.

A

The plaintiffs rely on five opinions from other circuits for the idea that the Four Princes' alleged involvement in a terrorist attack on a citizen of the United States constitutes purposeful direction at this forum, "such that [they] should reasonably anticipate being haled into court" here. *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174. But those cases all addressed defendants who were primary participants in terrorist acts. In *Mwani v. bin Laden,* 417 F.3d 1 (D.C.Cir.2005), the court exercised personal jurisdiction over al Qaeda and Osama bin Laden for injuries arising out of the bombing of our embassies in Kenya and Tanzania, reasoning that their "decision to purposefully direct their terror at the United States, and the fact that the plaintiffs' injuries arose out of one of those terrorist activities, should suffice to cause the defendants to 'reasonably anticipate being haled into' an American court." *Id.* at 14 (quoting *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174). Similarly, the defendant in *Morris v. Khadr,* 415 F.Supp.2d 1323 (D.Utah 2006), was an al Qaeda member who "actively participated in and helped plan al Qaeda's terrorist agenda—so much so, in fact, that he convinced his son to risk his life and attack American soldiers" in Afghanistan, killing the plaintiffs' relatives in the course of engagement. *Id.* at 1336. Two other cases dealt with civil claims against Libya (a designated state sponsor of terrorism) and its intelligence service for the bombing of commercial airplanes. *Pugh v. Socialist People's Libyan Arab Jamahiriya,* 290 F.Supp.2d 54, 59 (D.D.C.2003) ("[T]he individual defendants . . . conspired to

sabotage and succeeded in destroying a civilian commercial aircraft filled to capacity . . . on an international flight and expected to stop in several nations before reaching its final destination, [and so] the individual defendants could and should have reasonably postulated that passengers of many nationalities would be on board, from which they could also expect they might be haled into the courts of those nations whose citizens would die."); *Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F.Supp. 325, 330 (E.D.N.Y.1998) ("This case concerns the destruction [by Libya and its agents] of a United States flag aircraft, which was manufactured and ow[n]ed by United States corporations, while en route to the United States on a regularly scheduled flight with 189 United States nationals on board."). Finally, in *Daliberti v. Republic of Iraq,* 97 F.Supp.2d 38 (D.D.C.2000), the court exercised jurisdiction over Iraq (then designated a state sponsor of terrorism) for conduct within the Terrorism Exception. The court reasoned that the abuse of the American plaintiffs "had a direct effect in the United States and was consciously designed to affect United States policy. Under the circumstances, Iraq cannot now claim surprise at the assertion of jurisdiction by this Court over claims brought in response to its actions." *Id.* at 54.

The plaintiffs do not allege that the Four Princes directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them. *Cf. Calder,* 465 U.S. at 790, 104 S.Ct. 1482 (affirming that court could exercise personal over "*primary participants* in an alleged wrongdoing *intentionally directed* at a California resident" (emphasis added)). Rather, the plaintiffs rely on a causal chain to argue a concerted action theory of liability: the Princes

supported Muslim charities knowing that their money would be diverted to al Qaeda, which then used the money to finance the September 11 attacks. *Cf. Halberstam v. Welch,* 705 F.2d 472, 478 (D.C.Cir.1983) (distinguishing between civil conspiracy and aiding-abetting liability under the common law of torts); *Boim v. Quranic Literacy Inst.,* 291 F.3d 1000, 1028 (7th Cir.2002) (defining extent to which charities' alleged provision of material support to Hamas constituted an act of "international terrorism" such that charities could be civilly liable for injuries caused by Hamas).

Even if the Four Princes were reckless in monitoring how their donations were spent, or could and did foresee that recipients of their donations would attack targets in the United States, that would be insufficient to ground the exercise of personal jurisdiction. *See Burger King,* 471 U.S. at 474, 105 S.Ct. 2174 ("Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." (internal footnote omitted)). Rather, the plaintiffs have the burden of showing that the Four Princes engaged in "intentional, and allegedly tortious, actions . . . expressly aimed" at residents of the United States. *Calder,* 465 U.S. at 789, 104 S.Ct. 1482.

That burden is not satisfied by the allegation that the Four Princes intended to fund al Qaeda through their donations to Muslim charities. Even assuming that the Four Princes were aware of Osama bin Laden's public announcements of jihad against the

United States and al Qaeda's attacks on the African embassies and U.S.S. Cole, their contacts with the United States would remain far too attenuated to establish personal jurisdiction in American courts. It may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, but foreseeability is not the standard for recognizing personal jurisdiction. Rather, the plaintiffs must establish that the Four Princes "expressly aimed" intentional tortious acts at residents of the United States. *Calder,* 465 U.S. at 789, 104 S.Ct. 1482. Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct. In the absence of such a showing, American courts lacked personal jurisdiction over the Four Princes.

B

It is alleged that in his capacity as an executive of various private banks, Prince Mohamed knowingly and intentionally provided material support to terrorists who, in turn, planned to attack the United States. The allegations are as follows.

Until 2002, Mohamed served as the Chairman and CEO of DMI, a bank headquartered in Switzerland with operations throughout the world. "DMI has actively sponsored and supported the al Qa[e]da movement through several of its subsidiaries, including but not limited to the Islamic Investment Company of the Gulf, the Faisal Islamic Bank of Bahrain, Faisal Finance, Tadamon Islamic Bank, and Al Shamal Islamic Bank." DMI and its subsidiaries conform to sharia, the principle under Islamic law that "prohibits the earning or payment of interest." The plaintiffs

ask the Court to draw a "reasonable inference" that because of sharia, there exists "an active, not passive, relationship among an Islamic bank, its owners, and its large depositors." In other words, the owners of DMI and its subsidiaries "are close business partners with bank 'customers' in a partnership or collaboration to manage and invest customers' capital in a mutually beneficial way." Osama bin Laden, his bodyguard, and other al Qaeda operatives had deposits with DMI and its subsidiaries. (Also, bin Laden himself invested $50 million in one of DMI's subsidiaries.) Therefore, argue the plaintiffs, the September 11 attacks "were a direct result of the material support that Prince Mohamed . . . provided al Qaeda."

Mohamed disputes this characterization of sharia banking; but even assuming its accuracy, it does not reflect that Mohamed engaged in "intentional" conduct "expressly aimed at the United States." *Calder*, 465 U.S. at 789, 104 S.Ct. 1482. It may be that, but for access to financial institutions, al Qaeda could not have funded its terrorist attacks. But that does not mean that the managers of those financial institutions "purposefully directed" their "activities at residents of [this] forum." *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174. Moreover, Mohamed himself was never a director, officer, shareholder or employee of the banks that purportedly held terrorists' deposits. He is related to those institutions only insofar as the Faisal Islamic Bank of Bahrain (which he once managed) invested in them. For the same reasons explained above, we decline to read *Mwani*, *Morris*, *Pugh*, *Daliberti* and *Rein*, *supra*, to say that the provision of financial services to an entity that carries out a terrorist attack on United States citizens could make Prince Mohamed, in the circumstances pre-

sented here, subject to the jurisdiction of American courts.

The Ashton Plaintiffs argue in passing that we can impute the banks' actions to Mohamed, subjecting him to personal jurisdiction in the United States. This argument relies on *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40 (1988), which held that the "fiduciary shield doctrine" does not defeat personal jurisdiction under New York's long-arm statute. *Id.* at 472, 527 N.Y.S.2d 195, 522 N.E.2d 40. The fiduciary shield doctrine deems it "unfair to subject a corporate employee personally to suit in a foreign jurisdiction when his only contacts with that jurisdiction have been undertaken on behalf of his corporate employer." *Id.* at 467-68, 527 N.Y.S.2d 195, 522 N.E.2d 40; *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 902 n. 3 (2d Cir.1981) ("The fiduciary shield doctrine is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long arm statute."). Consequently, jurisdiction was held proper in *Kreutter* over an individual who, as a primary actor, "represented two corporations during their participation in purposeful corporate acts" in the state. *Kreutter,* 71 N.Y.2d at 470, 527 N.Y.S.2d 195, 522 N.E.2d 40.

Kreutter is plainly inapposite. There is no allegation that Mohamed served as the "primary actor" or "representative" of a foreign corporation that transacted business within the United States. Instead, the Ashton Plaintiffs allege that Mohamed was the "primary actor" who "ran, directed or controlled" various banks in the Kingdom, Switzerland and the Sudan. It may be that Mohamed was a "primary actor" with regard to the operations of certain foreign banks that

conducted business with al Qaeda. However, none of those business dealings are alleged to have taken place in the United States—unlike the "purposeful corporate acts" that took place in New York in *Kreutter*. 71 N.Y.2d at 470, 527 N.Y.S.2d 195, 522 N.E.2d 40. Because the transactions that Mohamed allegedly supervised had no direct contact with the United States, Mohamed was not a "primary actor" in any transaction that would cause him to be subject to the jurisdiction of American courts pursuant to *Kreutter*.

We affirm the district court's dismissal of all claims against Mohamed for lack of personal jurisdiction.

C

The plaintiffs challenge the district court's denial of their motions for jurisdictional discovery. "Since [Plaintiffs] did not establish a prima facie case that the district court had jurisdiction over [the defendants], the district court did not err in denying discovery on that issue." *Jazini*, 148 F.3d at 186.

CONCLUSION

For the foregoing reasons, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 MDL 1570 (RCC)

IN RE: TERRORIST ATTACKS ON
SEPTEMBER 11, 2001

This documents relates to: 02cv6977; 03cv5738; 03cv9849; 04cv7065; 04cv5970; 04cv7279; 03cv6978; 04cv6105; 04cv1923; 04cv1922; 04cv7216; 02cv7300; 03cv8591; 04cv7280.

JUDGMENT

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable Richard C. Casey, United States District Judge, and the Court, on December 16, 2005, having rendered its Order directing the Clerk of the Court to enter a final judgment pursuant to Fed. R. Civ. P. 54(b) dismissing the following twelve defendants: Kingdom of Saudi Arabia, HRH Crown Prince Sultan bin Abdulaziz Al-Saud, HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud, HRH Prince Naif bin Abdulaziz Al-Saud, HRH Prince Salman bin Abdulaziz Al-Saud, HRH Prince Mohamed Al-Faisal Al-Saud, the Saudi High Commission, Sheikh Hamad Al-Husani, Abdulrahman bin Mahfouz, Tariq Binladen, Omar Binladen, and Bakr Binladen, it is,

ORDERED, ADJUDGED AND DECREED: that for the reasons stated in the Court's Order dated December 16, 2005, that there is no just reason for delay, pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the following twelve defendants: Kingdom of Saudi Arabia, HRH Crown Prince Sultan bin Abdulaziz Al-Saud, HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud, HRH Prince Naif bin Abdulaziz Al-Saud, HRH Prince Salman bin Abdulaziz Al-Saud, HRH Prince Mohamed Al-Faisal Al-Saud, the Saudi High Commission, Sheikh Hamad Al-Husani, Abdulrahman bin Mahfouz, Tariq Binladen, Omar Binladen, and Bakr Binladen.

Dated: New York, New York
January 10, 2006

J. Michael McMahon
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 03 MDL 1570 (RCC)

IN RE: TERRORIST ATTACKS ON
SEPTEMBER 11, 2001

This document relates to:

Kathleen Ashton, et al. v. Al Qaeda Islamic Army, et al., 02-CV-6977; *Burnett, et al. v. Al Baraka Inv. & Dev. Corp., et al.*, 03-CV-5738; *Thomas E. Burnett, Sr., et al. v. Al Baraka Inv. & Dev. Corp., et al.*, 03-CV-9849; *Cantor Fitzgerald & Co., et al. v. Akida Bank Private Ltd., et al.*, 04-CV-7065; *Continental Casualty Co., et al. v. Al Qaeda, et al.*, 04-CV-5970; *Euro Brokers, Inc., et al. v. Al Baraka Inv. & Dev. Corp., et al.*, 04-CV-7279; *Federal Ins. Co., et al. v. Al Qaida, et al.* 03-CV-6978; *New York Marine and General Ins Co. v. Al Qaida, et al.*, 04-CV-6105; *Estate of John P. O'Neill, Sr., et al. v. Al Baraka Inv. & Dev. Corp., et al.*, 04-CV-1923; *Estate of John P. O'Neill, Sr., et al. v. Kingdom of Saudi Arabia, et al.* 04-CV-1922; *Pacific Employers Ins. Co., et al., v. Kingdom of Saudi Arabia, et al.*, 04-CV-7216; *Walter Tremsky, et al. v. Osama Bin Laden, et al.*, 02-CV-7300; *Vigilant Ins. Co., et al. v. Kingdom of Saudi Arabia, et al.*, 03-CV-8591; *World Trade Center Prop. LLC, et al. v. Al Baraka Inv. and Dev. Corp., et al.*, 04-CV-7280.

ORDER

This matter is before the Court upon the motion of twelve of the defendants who had cases against them

dismissed by the Court's Orders of January 18, 2005, May 5, 2005, and September 21, 2005. Upon consideration of this motion, the Court finds as follows:

1. On January 18, 2005, the Court entered an Order dismissing cases against the Kingdom of Saudi Arabia, HRH Crown Prince Sultan bin Abdulaziz Al-Saud, and HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud as barred by sovereign immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"). That Order also dismissed the claims in *Ashton v. Al Qaeda Islamic Army*, 02-CV-6977, and *Federal Insurance Co. v. Al Qaida*, 03-CV-6978, against HRH Prince Mohamed Al-Faisal Al-Saud and the claims in *Burnett v. Al Baraka Investment & Development Corp.*, 03-CV-9849, against Sheikh Hamad Al-Husani, Abdulrahman bin Mahfouz, Tariq Binladen, Omar Binladen, and Bakr Binladen for lack of personal jurisdiction.

2. On May 5, 2005, the Court entered an Order dismissing the remaining cases against the Kingdom of Saudi Arabia, HRH Crown Prince Sultan bin Abdulaziz Al-Saud, HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud, and HRH Prince Mohamed Al-Faisal Al-Saud, finding that "the allegations and evidence presented against these defendants in the cases still pending against them do not materially differ from the allegations and evidence presented in the cases already dismissed."

3. On September 21, 2005, the Court entered an Order dismissing cases against HRH Prince Naif bin Abdulaziz Al-Saud, HRH Prince Salman bin Abdulaziz Al-Saud, and the Saudi High Commission as barred by sovereign immunity under the FSIA. That Order dismissed claims in *Ashton v. Al Qaeda Islamic Army*, 02-CV-6977; *Burnett v. Al Baraka*

Investment & Development Corp., 03-CV-9849; and *Federal Insurance Co. v, Al Qaida,* 03-CV-6978. It also dismissed claims in *Barrera v. Al Qaeda Islamic Army,* 03-CV-7036, which had been consolidated with *Ashton*, and *Salvo v. Al Qaeda Islamic Army*, 03-CV-5071, which had been consolidated with *Burnett.*

4. There is no just reason to delay the entry of a final judgment dismissing these twelve defendants pursuant to Federal Rule of Civil Procedure 54(b). As the Court stated in its January 18, 2005 Order, questions concerning immunity under the FSIA should be resolved at the outset of a case. Any delay in entering final judgment on these claims would effectively deprive the defendants of their immunity by forcing them to continue actively monitoring cases from which they have been properly dismissed to ensure that their interests are fully protected.

Delaying entry of final judgment with respect to the defendants dismissed for lack of personal jurisdiction would be unfair as well. For more than three years, those defendants have borne the unique burdens of defending themselves in a foreign land and the obloquy of being listed among those responsible for a terrible crime.

Although some of the defendants still have additional cases pending against them, those cases do not differ materially from the cases already dismissed, and the Court would benefit from review by the Second Circuit Court of Appeals of its rulings to date. Certification of these threshold jurisdictional rulings as to these twelve defendants in the cases in which they have been dismissed would substantially advance the progress of this suit and would not result in unnecessary appellate review, and it therefore

would serve the interests of sound judicial administration.

ACCORDINGLY, IT IS HEREBY ORDERED this 16 day of December, 2005 that the Court's dismissals of the Kingdom of Saudi Arabia, HRH Crown Prince Sultan bin Abdulaziz Al-Saud, HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud, HRH Prince Naif bin Abdulaziz Al-Saud, HRH Prince Salman bin Abdulaziz Al-Saud, HRH Prince Mohamed Al-Faisal Al-Saud, the Saudi High Commission, Sheikh Hamad Al-Husani, Abdulrahman bin Mahfouz, Tariq Binladen, Omar Binladen, and Bakr Binladen in the Court's Orders of January 18, 2005, May 5, 2005, and September 21, 2005, are certified as final pursuant to Federal Rule of Civil Procedure 54(b). The Clerk of the Court is directed to prepare and enter a final judgment.

/s/ Richard C. Casey
Richard C. Casey
United States District Judge

December 16, 2005

APPENDIX D

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

Nos. 03 MDL 1570(RCC), 02 Civ. 6977,
03 Civ. 6978, 03 Civ. 9849.

In re: TERRORIST ATTACKS ON
SEPTEMBER 11, 2001

Sept. 21, 2005.

Opinion and Order

CASEY, District Judge.

The Court presumes familiarity with the factual background giving rise to this multi-district litigation. *See In re Terrorist Attacks on September 11, 2001,* 349 F.Supp.2d 765 (S.D.N.Y.2005) (*"Terrorist Attacks I"*). Generally, Plaintiffs are representatives, survivors, and insurance carriers of the victims of the attacks of September 11, 2001, who allege, pursuant to various theories of liability including the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.;* the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.;* the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note; theories of aiding and abetting, civil conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery, that Defendants are responsible for those attacks as terrorists, state sponsors of terror, or material sponsors of terror. In *Terrorist Attacks I,* the Court resolved several motions to dismiss the com-

plaints by various Defendants. Additional motions remain pending before the Court.

Saudi High Commission ("SHC"), HRH Prince Salman bin Abdulaziz Al-Saud ("Prince Salman"), and HRH Prince Naif bin Abdulaziz Al-Saud ("Prince Naif") move to dismiss the complaints for lack of subject matter jurisdiction pursuant to the FSIA, lack of personal jurisdiction, and failure to state a claim for relief. Immediately prior to the Court's scheduled oral argument on these motions, the Federal Plaintiffs moved to supplement the record against Prince Salman and Prince Naif.

Defendants Rabita Trust, Wa'el Jalaidan, and International Islamic Relief Organization ("IIRO") move to dismiss the complaints for lack of personal jurisdiction and failure to state a claim.

Other Defendants move to dismiss the complaints for failure to state a claim. Tarik Hamdi and Abdulrahman Alamoudi move to dismiss the *Burnett* and *Federal* complaints. Success Foundation moves to dismiss the *Burnett* complaint. The *Burnett* Plaintiffs denominate certain Defendants as the "SAAR Network entities." The SAAR Network entities, which include African Muslim Agency, Grove Corporate, Heritage Education Trust, International Institute of Islamic Thought ("IIIT"), Mar-Jac Investments, Mar-Jac Poultry, Reston Investments, Safa Trust, and York Foundation, move to dismiss the *Burnett* complaint. IIIT also moves to dismiss the *Ashton* complaint. In addition to its motion to dismiss *Burnett*, Mar-Jac Poultry moves to dismiss the *Ashton* and *Federal* complaints. The *Federal* Plaintiffs label certain individuals "SAAR Network executives." These Defendants, including Taha Al-Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, Iqbal

Unus, and Jamal Barzinji, move to dismiss the *Federal* complaint.

Finally, Defendant National Commercial Bank ("NCB") moves for reconsideration of this Court's denial without prejudice of its motions to dismiss the *Ashton* and *Burnett* complaints. The Court resolves all the aforementioned motions in this opinion.

I. Subject Matter Jurisdiction Under the FSIA

Pursuant to the FSIA, a foreign state and its instrumentalities are presumed immune from this Court's jurisdiction unless one of the statute's exceptions applies. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001). "In contrast to a Rule 12(b)(6) motion to dismiss for failure to state a claim, in a challenge to FSIA subject matter jurisdiction, the defendant must present a 'prima facie case that it is a foreign sovereign.'" *Virtual Countries v. Republic of South Africa,* 300 F.3d 230, 241 (2d Cir.2002) (quoting *Cargill Int'l S.A. v. M/T PAVEL DYBENKO,* 991 F.2d 1012, 1016 (2d Cir.1993)). "Then, the plaintiff 'has the burden of going forward with evidence showing that, under the exceptions to the FSIA, immunity should not be granted.'" *Virtual Countries,* 300 F.3d at 241 (quoting *Cargill,* 991 F.2d at 1016); *see also Terrorist Attacks I,* 349 F.Supp.2d at 792-797 (explaining that the possibly relevant exceptions to immunity in this litigation include the commercial activities, torts, and state sponsor of terrorism exceptions). Determining whether this burden is met involves a 'review [of] the allegations in the complaint, the undisputed facts, if any, placed before [the court] by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue [resolution of] disputed issues of fact.'" *Virtual Countries,* 300 F.3d at 241

(quoting *Robinson*, 269 F.3d at 141). Throughout the inquiry, Defendants retain the burden of persuasion, which they must meet by a preponderance of the evidence. *Virtual Countries*, 300 F.3d at 241; *see also Robinson*, 269 F.3d at 141 n. 8.

A. Allegations Against Defendants Asserting Foreign Sovereign Immunity

1. Saudi High Commission[1]

In 1993, then-King Fahad bin Abdulaziz Al-Saud, the President of the Council of Ministers of Saudi Arabia, decreed the formation of SHC, also known as the Saudi High Relief Commission, by High Order 17419. (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392; *Federal* Compl. ¶ 180; *see also* SHC Mem. in Sup. Mot. to Dismiss at 3.) The same High Order named Defendant Prince Salman the President of SHC. (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392; SHC Mem. in Sup. Mot. to Dismiss at 3.)

SHC allegedly has contributed $600 million to aid "Bosnian Muslims impoverished by the country's recent civil war." (*Ashton* Compl. ¶ 446; *Burnett* Compl. ¶ 392.) Plaintiffs claim, however, that SHC does not provide support to the needy but actually diverts funds for terrorist activities. (*Ashton* Compl. ¶ 454; *Burnett* Compl. ¶ 404.) In support, Plaintiffs allege that Prince Salman received a letter in September 2000 from a Bosnian association claiming SHC did not provide charitable assistance, and that none of

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[1] SHC moves to dismiss the *Ashton*, *Burnett*, *Federal*, *Barrera*, and *Salvo* complaints. The Court consolidated *Barrera v. al Qaeda Islamic Army*, 03 Civ. 7038, with *Ashton* on December 6, 2004. Similarly, at Plaintiffs' request, the Court consolidated *Salvo v. al Qaeda Islamic Army*, 03 Civ. 5071, with *Burnett* on August 16, 2005

the money collected after the fall of Srebrenica in July 1995 actually reached the Srebrenican people. (*Ashton* Compl. ¶¶ 454-55; *Burnett* Compl. ¶¶ 404-05; *Federal* Compl. ¶¶ 185, 457.) Plaintiffs claim SHC's financial records fail to account for $41 million. (*Ashton* Compl. ¶ 456; *Burnett* Compl. ¶ 407; *Federal* Compl. ¶ 460.) SHC allegedly made donations to charity Defendant Taibah and the bin Laden Establishment. (*Ashton* Compl. ¶¶ 376, 462 (relying on 1995 bin Laden interview); *Burnett* Compl. ¶ 298.) Plaintiffs also claim that SHC is responsible for "importing the extreme form of Saudi Islam, Wahhabism" to Bosnia. (*Ashton* Compl. ¶ 447; *Burnett* Compl. ¶ 393.)

The *Federal* Plaintiffs allege that al Qaeda fighters began entering Bosnia-Herzegovina in 1992 disguised as SHC relief workers. (*Federal* Compl. ¶ 183.) On October 21, 2001, a group of Algerians who were supposedly part of the al Qaeda network were arrested in Bosnia Herzegovina on charges of terrorism directed at the United States embassy. (*Ashton* Compl. ¶¶ 448-49; *Burnett* Compl. ¶¶ 394-95.) One of the arrested, Sabir Lamar, apparently worked for SHC as an Arabic language teacher. (*Ashton* Compl. ¶ 450; *Burnett* Compl. ¶ 396.) Also in October 2001, Plaintiffs claim that United States forces raided the Sarajevo branch of SHC and "found computer hard drives with photographs of the World Trade Center before and after its collapse as well as photos of United States embassies in Kenya and Tanzania and the U.S.S. Cole." (*Ashton* Compl. ¶ 451; *Burnett* Compl. ¶ 397; *Federal* Compl. ¶¶ 186, 458.) The U.S. forces also apparently found files on pesticides and crop dusters, the locations of Washington government buildings, fake State Department badges, and cash. (*Ashton* Compl. ¶¶ 451, 453; *Burnett* Compl. ¶¶ 397,

399; *Federal* Compl. ¶¶ 186, 459.) After the raid, the Financial Police of the Federation of Bosnia Herzegovina Ministry of Finance analyzed the seized documents and stated that some did "not belong in the scope of work of a humanitarian organization." (*Federal* Compl. ¶¶ 187, 459; *see also Ashton* Compl. ¶ 452; *Burnett* Compl. ¶ 398.) The *Federal* Plaintiffs claim that the SHC "has long acted as a fully integrated component of al Qaida's logistical and financial support infrastructure . . . [and that the attacks of September 11 were] a direct, intended and foreseeable product of [its] participation in al Qaida's jihadist campaign." (*Federal* Compl. ¶¶ 182, 189.)

2. Prince Salman[2]

Prince Salman is a member of the Kingdom of Saudi Arabia's Council of Ministers, the governor of the province of Riyadh, and the President of Defendant SHC. (Prince Salman Mem. in Sup. Mot. to Dismiss at 2.) Plaintiffs allege that Prince Salman provided material support to Osama bin Laden and al Qaeda. (*Ashton* Compl. ¶ 255; *Burnett* Compl. ¶ 403; *Federal* Compl. ¶¶ 455, 463; *see also Federal* RICO Statement Applicable to Saudi Princes at Ex. A.) The Federal Plaintiffs claim Prince Salman "fully intended [SHC] would serve as a vehicle for funding and supporting Islamic militants in Bosnia, including elements of the al Qaida movement." (*Federal* Compl. ¶ 456.) "Prince Salman knowingly failed to take appropriate actions regarding the management and use of funds of the SHC in Bosnia." (*Ashton* Compl. ¶ 457; *Burnett* Compl. ¶ 406.) On December 30, 2000, the Embassy of the State of Palestine in Riyadh sent

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[2] Prince Salman moves to dismiss the *Ashton*, *Burnett*, and *Federal* complaints

Prince Salman a letter expressing Yasser Arafat's concern regarding the funding of radical organizations in Palestine. (*Ashton* Compl. ¶ 291; *Burnett* Compl. ¶ 402.) Further, Plaintiffs claim Prince Salman "has a history of funding Islamic extremism," because he was named the Chairman of the General Donation Committee for Afghanistan in 1980, which gave $39 million to aid the Afghan mujahideen. (*Ashton* Compl. ¶ 289; *Burnett* Compl. ¶ 400.)

In 1994, Prince Salman allegedly stated that he had personally raised more than six million Saudi Riyals for Defendant IIRO and Sanabel al-Kheer. (*Federal* Compl. ¶ 462.) And in 1998, he allegedly donated one million Saudi Riyals during a fundraising drive by IIRO and Sanabel al-Kheer. (*Federal* Compl. ¶ 461.) In 1999, Prince Salman donated $400,000 during a fundraising event organized by charity Defendants IIRO, World Assembly of Muslim Youth ("WAMY"), and Al-Haramain Foundation for the benefit of Bosnia Herzegovina and Chechnya. (*Ashton* Compl. ¶ 290; *Burnett* Compl. ¶ 401; *Federal* Compl. ¶ 461.) Finally, Plaintiffs claim that members of the Saudi royal family have assets and do business in the United States. (*Ashton* Compl. ¶ 296.)

3. Prince Naif[9]

Prince Naif has been the Minister of Interior of the Kingdom of Saudi Arabia since 1975. (*Ashton* Compl. ¶ 286; *Federal* Compl. ¶ 433; Prince Naif Mem. in Supp. Mot. to Dismiss at 1, 5.) According to Plaintiffs, the Minister of Interior "controls the activities of Islamic Charities and is empowered to verify their legality and conduct." (*Ashton* Compl. ¶ 286; *Burnett*

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[9] Prince Naif moves to dismiss the *Ashton*, *Burnett*, and *Federal* complaints

Compl. ¶ 382; *see also Federal* Compl. ¶ 435 (alleging that as Minister of Interior Prince Naif is "responsible for the oversight of charities based within Saudi Arabia, including the operations of the Saudi Joint Relief Committee [('SJRC')], Muslim World League [('MWL')], IIRO, Saudi Red Crescent, WAMY, and al Haramain Foundation").) He is also a member of the Council of Ministers and serves on the Supreme Council for Islamic Affairs. (Plaintiff's Mem. in Opp'n to Prince Naif's Mot. at 2-3, 5.)

Plaintiffs claim that "Prince Naif has engaged in a pattern of conduct that aids, abets, and materially sponsors international terrorism and Al Qaeda." (*Ashton* Compl. ¶¶ 288, 255; *Burnett* Compl. ¶¶ 342, 381; *Federal* Compl. ¶ 434; *see also Federal* RICO Statement Applicable to Saudi Princes at Ex. A.) They claim that along with other Saudi princes, Prince Naif made "monetary payoffs to Osama bin Laden's al Qaeda." (*Ashton* Compl. ¶ 288; *Burnett* Compl. ¶ 381.) "In 1996, according to various intelligence sources, a group of Saudi princes . . . met in Paris and agreed to continue contributing, sponsoring, aiding and abetting Osama bin Laden's terrorist network." (*Burnett* Compl. ¶ 347.) Plaintiffs claim that Prince Naif and the Saudi government received warnings from the United States and France that charitable donations to Islamic charities were being used to fund terrorism. (*See* Plaintiffs' Mem. in Opp'n to Naif's Mot. to Dismiss at 5.) Prince Naif was present for one such meeting in 1994 with French Interior Minister Charles Pasqua. (*Id.*) The *Federal* Plaintiffs allege that Prince Naif has used his position as the Minister of Interior to "protect al Qaida's support infrastructure." (*Federal* Compl. ¶ 438.)

The *Federal* complaint further alleges that "[b]etween 1998 and 2000, the Kingdom of Saudi Arabia, through SJRC, diverted more than $74 million to al Qaida members and loyalists affiliated with SJRC bureaus. Throughout this time, [SJRC] was under the supervision and control of . . . Prince Naif." (*Federal* Compl. ¶¶ 126, 436.) "Prince Naif also heads the Saudi Committee for Relief to Afghans, . . . [i]n this position, Prince Naif has channeled substantial financial and logistical support to sustain al Qaida's presence and operations in Afghanistan." (*Id.* ¶ 437.) Plaintiffs allege that Prince Naif is the "Chairman of the Saudi Arabian Committee for Support of the Intifada al Quds, [which] knowingly transferred large sums of money to the families of Hamas terrorists who had executed murderous attacks against Israelis." (*Ashton* Compl. ¶ 287; *Burnett* Compl. ¶ 379; *Federal* Compl. ¶ 439; *see also Burnett* Compl. ¶ 380 (citing letter written on behalf of Yasser Arafat and claiming this committee funds radical groups).) As a result, Plaintiffs assert that "Prince Naif . . . supports suicide martyrs." (*Ashton* Compl. ¶ 287; *Burnett* Compl. ¶ 379.) The *Federal* Plaintiffs also allege that in 2003, U.S. Senator Charles Schumer asked that Prince Naif be replaced as Interior Minister because of his "well-documented history of supporting terrorist financing and ignoring the evidence when it comes to investigating terrorist attacks on Americans." (*Federal* Compl. ¶ 441.) Finally, the *Federal* Plaintiffs claim Prince Naif made significant personal contributions to Saudi-based charities that were sponsors of al Qaida's operations, including IIRO, MWL, WAMY, BIF, SHC, SJRC, and al Haramain. (*Federal* Compl. ¶¶ 442-43.)

The Federal Plaintiffs seek leave to supplement the record against Prince Salman and Prince Naif with

an article that appeared in *Rus al Yusef,* an Egyptian publication, in August 1998. The unidentified author writes that Islamic aid organizations located in Afghanistan, Bosnia, Somalia, and Tajikistan provided funds and cover to terrorists. (*See* Federal Mot. to Supplement Record on Prince Naif and Prince Salman, Ex. 2, at 2.) Donors to these unidentified organizations "probably ha[d] no idea where their charity money ha[d] gone." (*Id.*) Prince Naif reportedly responded that "if charity money is going to illegitimate targets, it must stop immediately." (*Id.*) From this submission, the Plaintiffs argue that the Princes knew their charitable donations were going to terrorists.

The submission is problematic for a variety of reasons and will not be accepted. First, Plaintiffs do not provide an explanation as why they were only able to obtain and translate the article on the eve of oral argument—well after the motions were fully submitted. Second, the article and its translation have not been authenticated. More pointedly, however, it simply does not say that the Princes were put on notice regarding specific charities and that they continued to contribute to those charities with the intent that their donations would assist al Qaeda. The *Federal* Plaintiffs' motion to supplement the record against Prince Salman and Prince Naif is denied.

B. Defendants' Status as Foreign States for FSIA Purposes

The FSIA provides the following definition of "foreign state":

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603. Further, "immunity under the FSIA extends also to agents of a foreign state acting in their official capacities [because] [i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Bryks v. Canadian Broad. Corp.*, 906 F.Supp. 204, 210 (S.D.N.Y.1995) (internal quotations omitted); *see also Terrorist Attacks I*, 349 F.Supp.2d at 788-89 (finding Princes Sultan and Turki were foreign states for FSIA purposes to the extent Plaintiffs alleged liability for actions taken in their official capacities).

1. SHC

SHC contends that it is an organ, agency, or instrumentality of the Kingdom of Saudi Arabia and acts on behalf of the Kingdom to fund a range of humanitarian relief efforts to Bosnia, Egypt, and Somalia. (*See generally* Al-Roshood Decl., at Huffman Decl. Ex. A.) In support of its position as a foreign state, SHC submits the affidavits of Dr. Al-Nafissa, a Saudi Arabian lawyer and a Minister of State on the Coun-

cil of Ministers in the Kingdom of Saudi Arabia, and Mr. Al-Roshood, who has been the Director of the Executive Office of SHC since its inception. The Court notes it is "required to give 'great weight' to any extrinsic submissions made by the foreign defendants regarding the scope of their official responsibilities." *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah,* 184 F.Supp.2d 277, 287 (S.D.N.Y.2001).

King Faud authorized Dr. Al-Nafissa to make his declaration concerning SHC. (Al-Nafissa Decl. ¶ 2, at Huffman Decl. Ex. C.) Dr. Al-Nafissa attests that SHC is "an arm of the Saudi Arabian government [and that its actions] are in keeping with the foreign and domestic governmental policies of the Kingdom of Saudi Arabia." (*Id.* ¶ 3.) SHC was formed by Decision of the President of the Council of Ministers in 1993. (Al-Roshood Decl. ¶ 6.) In the same Decision, the Council of Ministers appointed Prince Salman as President of SHC. (*Id.* ¶ 7.) As President of SHC, Prince Salman is the head of SHC's Executive Committee and Supreme Commission, members of which Prince Salman appoints. (*Id.*) SHC is staffed by civil servant employees of the Kingdom of Saudi Arabia. (*Id.* ¶ 10.)

Dr. Al-Nafissa states that private charities in the Kingdom of Saudi Arabia receive governmental approval through Royal Order, are run by boards, and disburse funds in accordance with their charters. (Al-Nafissa Decl. ¶ 5.) In contrast, governmental commissions, such as SHC, are chaired by a governmental official, like Prince Salman, and conduct their affairs in accordance with the Kingdom's policy objectives. (*Id.* ¶ 5.) According to Dr. Al-Nafissa, "[d]ecisions regarding causes to support and recipients for Saudi High Commission funds are within the

discretion of the Executive Committee, the Supreme Commission, and Prince Salman." (*Id.* ¶ 8.) The Kingdom of Saudi Arabia is SHC's largest source of funding, having provided approximately 30% of the funds used and distributed by SHC. (Al-Roshood Decl. ¶ 24.) The remainder of SHC funds are collected through fundraisers "in accordance with the directives of . . . King Fahd." (*Id.* ¶ 5.) SHC can be sued for its administrative acts in the Board of Grievances. (Al-Nafissa Decl. ¶ 8.)

In their complaint, the *Federal* Plaintiffs alleged that SHC is "an agency, instrumentality and organ of the Kingdom of Saudi Arabia." (*Federal* Compl. ¶ 181.) They now back away from that allegation and join other Plaintiffs in disputing SHC's status. Plaintiffs submit that SHC has repeatedly and systematically described itself as a non-governmental organization in representations to the Bosnian government. (*See* Plaintiffs' Mem. in Opp'n to SHC Mot. to Dismiss at 10.) Thus, even if SHC is considered a foreign state, Plaintiffs assert it has implicitly waived its immunity through those representations. *See* 28 U.S.C. § 1605(a)(1) (FSIA waiver provision). Plaintiffs also argue that it is disingenuous for SHC to simultaneously maintain that it is an organ of the Kingdom and that this Court lacks personal jurisdiction over it when the Kingdom itself did not dispute the personal jurisdiction issue.

In response to Plaintiffs' arguments that it described itself as a non-governmental organization to Bosnian authorities, SHC submits the declaration of Hadsimuratovic Hajrudin, a Bosnian lawyer who serves as a legal advisor to SHC. (*See generally* Hajrudin Decl. at SHC Reply Ex. A.) Mr. Hajrudin states that SHC characterized itself as non-

governmental in accordance with Article 22 of the Law on Humanitarian Activities and Humanitarian Organizations of the Federation of Bosnia and Herzegovina because SHC is "not considered part of the government of Bosnia-Herzegovina." (*Id.* ¶ 4.) Mr. Hajrudin attests that the head of SHC's European Office received diplomatic status in Bosnia-Herzegovina in 1996 because SHC is an organization of the Saudi government. (*Id.* ¶ 6.) He also states that the Kingdom of Saudi Arabia is represented by SHC when it makes donations to Bosnia-Herzegovina. (*Id.*)

There is no dispute that SHC is a separate legal person from the Kingdom and not a citizen of the United States or any third country. *See* 28 U.S.C. § 1603. Accordingly, the only dispute regarding SHC's status is whether it is an organ of the Kingdom. In *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir.2004), the Second Circuit considered various factors to determine whether an entity could be considered an organ of a foreign sovereign. *Id.* at 217. The factors include:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217 (citations omitted).

SHC offers undisputed evidence that it was created by the Kingdom's Council of Ministers to "centralize all charitable giving from the Kingdom to Bosnia-Herzegovina [and that it was] vested with the sole

authority to collect and distribute charitable funds in Bosnia." (Al-Roshood Decl. ¶¶ 5-6; Hajrudin Decl. ¶ 6 & Ex. D (noting the Kingdom of Saudi Arabia provides humanitarian relief to Bosnia through SHC).) The Council of Ministers appointed Prince Salman to supervise SHC. (Al Roshood Decl. ¶¶ 7-9.) The salaries of SHC employees are paid by either the Kingdom of Saudi Arabia or out of the SHC budget. (*Id.* ¶ 10.) Like other Saudi Arabian government agencies, SHC can be sued in the administrative court of the Kingdom. (Al-Nafissa Decl. ¶ 8.)

The Court finds that SHC has made a prima facie showing that it is a foreign sovereign. *See Cargill,* 991 F.2d at 1016 (requiring defendant to make prima facie case of sovereignty). Because SHC was formed by order of the Kingdom's governing body, it provides the Kingdom's aid to Bosnia, it is governed by a Saudi official and its employees are civil servants, it is an organ of the Kingdom of Saudi Arabia. *See Filler,* 378 F.3d at 217. Further, the Court finds SHC has not waived its sovereign immunity. The representations to the contrary on which Plaintiffs rely were made before this lawsuit was contemplated and cannot be read as a waiver of immunity from this court's jurisdiction. The Second Circuit has made clear that the waiver of FSIA immunity must be explicit. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.,* 344 F.3d 255, 261 (2d Cir.2003) (requiring wavier that unambiguously waives claims of immunity from legal proceedings in this country). Finally, Plaintiffs have not identified a factual dispute that would require jurisdictional discovery. *See Filetech S.A. v. France Telecom S.A.,* 304 F.3d 180, 183 (2d Cir.2002) (finding no abuse of discretion where district court resolved jurisdictional issue without holding evidentiary hearing because factual

disputes were "readily ascertainable" from the record). Accordingly, Plaintiffs must demonstrate that an exception under the FSIA applies to their claims against SHC. *See Virtual Countries*, 300 F.3d at 241.

2. Prince Salman and Prince Naif

Aside from allegations regarding personal contributions to charities that were fronts for terrorists, the Plaintiffs' claims against Prince Salman and Prince Naif concern their official functions. The allegations against Prince Salman, for example, center on his role as President of SHC, (*see, e.g., Ashton* Compl. ¶ 457; *Burnett* Compl. ¶ 406; *Federal* Compl. ¶ 456) or as Governor of Riyadh, (*see Ashton* Compl. ¶ 291; *Burnett* Compl. ¶ 402). Similarly, the allegations against Prince Naif center on his role as Minister of Interior of the Kingdom. (*See Ashton* Compl. ¶ 286; *Burnett* Compl. ¶ 382; *Federal* Compl. ¶ 435.) To the extent the allegations concern actions undertaken in their government positions, the Court finds that Prince Salman and Prince Naif are foreign states for FSIA purposes. *See Leutwyler*, 184 F.Supp.2d at 286-87 (recognizing that "individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities"). Thus, Plaintiffs must also show that an FSIA exception applies to Princes Salman and Naif. *Virtual Countries*, 300 F.3d at 241.

C. Application of FSIA Torts Exception

Plaintiffs claim any immunity enjoyed by SHC, Prince Salman, and Prince Naif is overcome by the FSIA's torts exception. The *Federal* Plaintiffs also argue that the commercial activities exception should lift the sovereigns' immunity. For the reasons ex-

plained in its previous opinion, the Court concludes that the torts exception is the only exception relevant to the allegations contained in the *Ashton, Burnett,* and *Federal* complaints against SHC, Prince Salman, and Prince Naif. *See Terrorist Attacks I,* 349 F.Supp.2d at 793-94 (explaining that the *Federal* Plaintiffs' reliance on the commercial activities exception is inappropriate because the alleged acts by Defendants were not the type of actions "by which a private party engages in trade and traffic or commerce," and explaining the state sponsor of terrorism exception applies only to designated state sponsors of terror, of which the Kingdom of Saudi Arabia is not).

The torts exception lifts immunity for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official . . . of that foreign state while acting in the scope of his office." 28 U.S.C. § 1605(a)(5). For jurisdiction to be proper under the torts exception, Plaintiffs will have to show, first, that the Defendants' tortious acts caused Plaintiffs' injuries. *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 142 (2d Cir.2001) ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5)."). Second, Plaintiffs must show that Defendants' actions were not discretionary, *i.e.*, not grounded in the social, economic, or political policies of the Kingdom of Saudi Arabia. *Terrorist Attacks I,* 349 F.Supp.2d at 794-97; *see also* 28 U.S.C. § 1605(a)(5)(A) (providing that the torts exception is not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused"). "Under the FSIA's 'discretionary function'

exception, 'acts which are performed at the planning level of government, as opposed to those at the operational level, are protected by the immunity.'" *Marchisella v. Gov't of Japan,* No. 02 Civ. 10023(DC), 2004 WL 307248, at *2 (S.D.N.Y. Feb.17, 2004) (quoting *Napolitano v. Tishman Constr. Corp.,* No. 96 Civ. 4402(SJ), 1998 WL 102789, at *4 (E.D.N.Y. Feb.26, 1998)).

Here, since SHC, Prince Salman, and Prince Naif are not alleged to have been the actual perpetrators of the attacks, Plaintiffs rely on theories of conspiracy and aiding and abetting.

> Conspiracy and aiding and abetting are varieties of concerted-action liability: conspiracy requires an agreement to commit a tortious act . . . , aiding and abetting requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer. . . . In order to be liable for acting in concert with the primary tortfeasor under either theory, the defendant must know the wrongful nature of the primary actor's conduct.

Pittman v. Grayson, 149 F.3d 111, 122-23 (2d Cir.1998). Accordingly, to survive these Rule 12(b)(1) motions to dismiss, Plaintiffs must plead facts from which it reasonably can be inferred that the Defendants knew or should have known that their tortious actions were supporting terrorists or terrorist fronts. *Terrorist Attacks I,* 349 F.Supp.2d at 800-01; *see also Boim v. Quranic Literacy Inst.,* 291 F.3d 1000, 1023 (7th Cir.2002) ("*Boim II*") (explaining elements of concerted-action civil liability under ATA); *Virtual Countries,* 300 F.3d at 241 ("Determining whether [Plaintiffs have demonstrated that one of the FSIA's exceptions applies] involves a review of the allega-

tions in the complaint, the undisputed facts, if any, placed before the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of fact.") (internal quotations omitted).

1. SHC

Even if Plaintiffs alleged that SHC was tortiously liable for the attacks of September 11, such allegations could not overcome the discretionary function exception. SHC offers undisputed evidence that all decisions regarding the distribution of humanitarian relief funds were within the sole discretion of its Chairman Prince Salman and the advisors he selected. (*See* Al-Nafissa Decl. ¶ 8.) Further, SHC was guided by the Kingdom's policies regarding Bosnia-Herzegovina in making its funding determinations. (*Id.* ¶ 3.) Accordingly, SHC's alleged misuse of funds and/or inadequate record-keeping—even if it resulted in the funds going to terrorists—was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity. *See U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (explaining FTCA discretionary function exception is designed to "prevent judicial 'second-guessing' of . . . decisions grounded in social, economic, and political policy through the medium of an action in tort"); *Marchisella,* 2004 WL 307248, at *2 (explaining the FSIA's discretionary function exception replicates that found in the FTCA and that courts rely on the FTCA for guidance in interpreting the scope of the FSIA's exception); *Kline v. Kaneko,* 685 F.Supp. 386, 392 (S.D.N.Y.1988) (explaining sovereign's decisions regarding formation and

enforcement of national policies are discretionary functions); 28 U.S.C. § 1605(a)(5)(A) (stating torts exception is not applicable to claims based discretionary actions, even when that discretion is abused). Accordingly, the Court finds SHC is immune from suit in this litigation. Its motions to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack [sic] subject matter jurisdiction are granted.

2. Prince Salman and Prince Naif

Similarly, even if Plaintiffs adequately plead a tort against Prince Salman and Prince Naif, the discretionary function exception prevents this Court from exercising jurisdiction over them in their official capacities. Plaintiffs take issue with Prince Salman's management of SHC and its funding decisions. Prince Salman's direction of SHC, however, is discretionary. He was appointed President of SHC by King Fahd to carry out the Kingdom's policy toward the refugees of the Bosnian war. (Al-Roshood Decl. ¶ 6; Al-Nafissa Decl. ¶ 5.) Plaintiffs claim that as Chairman of the General Donation Committee for Afghanistan he assisted the Afghanistan mujahideen in the 1980s. To the extent Prince Salman held this position as a member of the Saudi government, this was also a policy decision made at the operational level of government. Plaintiffs claim Yasser Arafat complained to Prince Salman as Governor of Riyadh regarding Saudi funding of extremists in Palestine. Plaintiffs do not allege, however, what relation that complaint has to the al Qaeda terrorists or this litigation. They argue that Prince Salman, who did not attend the meeting with the former French Minister of Interior, should have known from Saudi officials who did meet with him that unnamed terrorists were receiving

funding from largely unidentified Saudi charities.[4] *See Terrorist Attacks I*, 349 F.Supp.2d at 799. The Saudi attendees' decisions concerning with whom the French Minister's warnings should be shared and what the Saudi response would be, are surely grounded in social, economic, and political policy, and are, therefore, not actionable under the FSIA. *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755.

Similarly, the claims against Prince Naif stem from his discretionary functions. The Plaintiffs complain that Prince Naif, as Minister of Interior, ignored warnings in 1994 from French Interior Minister Charles Pasqua that Islamic charities were being used to fund terrorism. Additionally, Plaintiffs contend that he did not adequately supervise certain Saudi charities whose diverted funds allegedly landed in the coffers of al Qaeda and Hamas.

Prince Naif's role on the Council of Ministers and as Minister of Interior makes it "nearly self-evident" that his official acts are "squarely covered by the 'discretionary function' language of [the FSIA]." *Burnett II*, 292 F.Supp.2d at 20. As the Minister of Interior, Prince Naif oversees matters relating to Saudi public security, civil defense, fire service, police, passports, special security, and investigative forces. The Council of Ministers, of which he is a member, oversees the implementation of internal, external, financial, economic, educational, defense policies, and general affairs of state for the Kingdom. Prince Naif's official responsibilities included managing Saudi relations with Osama bin Laden, *see* Prince Naif Mem. in

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[4] The French Interior Minister named one charity, the World Islamic League, during his meeting. Plaintiffs claim this is another name for the Muslim World League.

Supp. Mot. to Dismiss at 2 (stating Prince Naif urged the Kingdom to strip bin Laden of his Saudi citizenship in 1994), and thus became a target of al Qaeda himself (*see, e.g.*, Bierstein Aff. in Opp'n to Prince Sultan's Mot. to Dismiss (fatwa issued by Osama bin Laden expressing extreme bitterness toward Saudi Royal family).) Therefore, Prince Naif's administration of his responsibilities was "clearly . . . grounded in social, economic, and political policy." *Burnett II*, 292 F.Supp.2d at 21 (citing *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755)).

This Court lacks subject matter jurisdiction over Prince Salman and Prince Naif for their official acts. The FSIA does not immunize an official for his private tortious acts, however. *See* 28 U.S.C. § 1605(a)(5) (explaining torts exception is relevant to official's official acts); *Leutwyler*, 184 F.Supp.2d at 286-87 (explaining officials are "deemed foreign states when they are sued for actions undertaken within the scope of their official capacities"). Accordingly, the Court will consider the appropriateness of exercising personal jurisdiction over Prince Salman and Prince Naif for their alleged personal acts below.

II. Personal Jurisdiction

To survive the motions to dismiss under Federal Rule of Civil Procedure 12(b)(2), Plaintiffs must make a prima facie showing that personal jurisdiction exists over each moving Defendant. *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir.1997). The Court reviews the complaints and affidavits in a light most favorable to Plaintiffs, *id.*, but it does not accept conclusory allegations or draw "argumentative inferences." *Mende v. Milestone Tech., Inc.*, 269 F.Supp.2d 246, 251 (S.D.N.Y.2003) (citing *Robinson*

v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir.1994)).

Plaintiffs offer two bases for personal jurisdiction. First, New York's long-arm statute, which the Court looks to in federal question cases in which no federal statute provides for national service of process or when the Court is sitting in diversity. *PDK Labs*, 103 F.3d at 1108; *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir.2002). New York's long-arm statute, C.P.L.R. 302(a)(2), provides for personal jurisdiction over a person who, personally or through an agent, "commits a tortious act within the state." Because a co-conspirator can be considered an agent, *see Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1266 (S.D.N.Y.1991), Plaintiffs argue that Defendants are subject to personal jurisdiction here based on the acts of their co-conspirators, the al Qaeda terrorists.

As this Court has previously explained, to establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy and allege facts warranting an inference that the defendant was a member of the conspiracy. *Terrorist Attacks I*, 349 F.Supp.2d at 805. "To plead a valid cause of action for conspiracy . . . a plaintiff must allege the primary tort and four elements: '(a) a corrupt agreement between two or more persons, (b) an overt act in furtherance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury.'" *Chrysler Capital Corp.*, 778 F.Supp. at 1267 (quoting *Kashi v. Gratsos*, 790 F.2d 1050, 1055 (2d Cir.1986)). Further, "[t]o warrant the inference that a defendant was a member of the conspiracy, Plaintiffs

must show that '(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control' of or 'at the request of or on behalf of' the out-of-state defendant." *Terrorist Attacks I*, 349 F.Supp.2d at 805 (quoting *Chrysler Capital Corp.*, 778 F.Supp. at 1268-69). The Court must resolve the question of whether a conspiracy exists "based upon an independent examination of the factual allegations while mindful of its duty to draw all factual inferences in plaintiffs' favor." *Daventree v. Republic of Azerbaijan*, 349 F.Supp.2d 736, 760 (S.D.N.Y.2004).

The alternative basis for personal jurisdiction offered by Plaintiffs is found in Federal Rule of Civil Procedure 4(k). Rule 4(k)(1) provides that service of process establishes personal jurisdiction when service is authorized by a federal statute. Here, the ATA provides for personal jurisdiction through its nationwide service of process provision. *See* 18 U.S.C. § 2334(a); Fed.R.Civ.P. 4(k)(1)(D). In situations in which Defendants were not served in the United States pursuant to the ATA, Rule 4(k)(2) acts as a personal jurisdiction gap-filler "in the enforcement of federal law." Fed.R.Civ.P. 4(k)(2) advisory committee's note. For the Court to exercise personal jurisdiction pursuant to Rule 4(k)(2), "there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient minimum contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process." *Terrorist Attacks I*, 349

F.Supp.2d at 807 (citing *United States v. Int'l Bhd. of Teamsters,* 945 F.Supp. 609, 617 (S.D.N.Y.1996)).

Under either basis offered by Plaintiffs, the exercise of personal jurisdiction must comport with due process requirements—there must be minimum contacts and the exercise of jurisdiction must be reasonable. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 567 (2d Cir.1996); *see also Terrorist Attacks I,* 349 F.Supp.2d at 810-11 (reviewing due process requirements); *Ungar v. Palestinian Auth.,* 153 F.Supp.2d 76, 87 (D.R.I.2001) (requiring minimum contacts with the United States for personal jurisdiction under ATA). If personal jurisdiction is based on New York's long-arm statute, the Fourteenth Amendment's due process standards apply. If jurisdiction is based on Rule 4(k), the Fifth Amendment applies. The analysis is essentially the same. "The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only contacts with the forum state may be considered." *Chew v. Dietrich,* 143 F.3d 24, 28 n. 4 (2d Cir.1998).

Plaintiffs claim that Rule 4(k)'s minimum contacts requirement is satisfied because the Defendants have purposefully directed their activities at the United States. *See Terrorist Attacks I.,* 349 F.Supp.2d at 807 (reviewing the purposefully directed activities theory). This Court has held that to succeed on this theory, "Plaintiffs must make a prima facie showing of each Defendant's personal or direct participation in the conduct giving rise to Plaintiffs' injuries." *Id.* at 809.[5] The Court does not require direct participation

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[5] Plaintiffs bring the Court's attention to *Mwani v. bin Laden,* 417 F.3d 1 (D.C.Cir.2005), in which the D.C. Circuit found that

in the attacks themselves, but at least participation in al Qaeda's terrorist agenda.

In analyzing a defendant's minimum contacts, courts distinguish between specific and general jurisdiction. "Specific jurisdiction exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum." *Terrorist Attacks I,* 349 F.Supp.2d at 811 (citing *Metro. Life Ins.* 84 F.3d at 567-68). General jurisdiction is based on a defendant's general business contacts with the forum. Because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required and the plaintiff must demonstrate the defendant's continuous and systematic general business contacts with the forum. *Metro. Life. Ins.,* 84 F.3d at 568; *see also Helicopteros Nacionales de Colombia, S.A.,* 466 U.S. 408, 414-16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

Osama bin Laden and al Qaeda were subject to personal jurisdiction under Rule 4(k)(2) because they had "engaged in unabashedly malignant actions directed at and felt in this forum." *Id.* at 13 (citing, among other examples, bin Laden's and al Qaeda's orchestration of the Nairobi embassy bombing and the 1993 World Trade Center bombing, their plot to bomb various landmarks in New York City, their fatwas against Americans, the criminal indictment against them arising from the Nairobi attack, and the conclusions of the 9/11 Commission). As a result, their "decision to purposefully direct their terror at the United States, and the fact that the plaintiffs' injuries arose out of one of those terrorist activities, should suffice to cause the defendants to 'reasonably anticipate being haled into' an American court." *Id.* at 14. In light of the level of bin Laden's and al Qaeda's unquestionably direct involvement in the Nairobi attack, *Mwani* supports this Court's conclusion that a defendant's actions must be personal or direct so that the defendant has fair warning that his activities could subject him to personal jurisdiction in the United States. *Id.*

In most instances, Plaintiffs do not specify which basis for personal jurisdiction applies to each Defendant, or whether the Defendant was served in the United States pursuant to the ATA's nationwide service of process provision. Accordingly, in analyzing Defendants' motions, the Court considers as a threshold matter whether Plaintiffs have made a prima facie showing of the Defendant's minimum contacts with the United States as a whole.

A. Prince Salman and Prince Naif

Plaintiffs seek to hold Prince Salman responsible for the attacks of September 11, theorizing that Prince Salman purposefully directed his activities at the United States by contributing to and raising funds for IIRO, Sanabel-al Kheer, WAMY, and Al-Haramain. As for other contacts with the United States, Prince Salman owns stock in two United States corporations based in Texas, and, during a trip to the United States in 1989, he met with President George H.W. Bush and the governor of Maryland. (Plaintiffs' Opp'n to Prince Salman Mot. to Dismiss at 21-22; *see generally* Parrett Aff.) Additionally, Plaintiffs claim that Prince Salman's son attended school in California, had a residence in the United States, owned a corporation that breeds race horses in the United States, and is involved, through his estate, in a New Jersey lawsuit with a former employee. *Id.* They seek jurisdictional discovery to determine if Prince Salman has other contacts here.

Plaintiffs do not allege that Prince Naif has any general contacts with the United States. Rather, they claim that he purposefully directed his activities toward the United States by making personal contributions to several Saudi-based charities. (*Federal* Compl. ¶¶ 442-43.)

Plaintiffs must make a prima facie showing that Prince Salman and Prince Naif have minimum contacts with the United States. The minimum contacts requirement is satisfied "if the defendant has 'purposefully directed' his activities at the residents of the forum." *Burger King v. Rudzewicz,* 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Foreseeability is not enough, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum." *Id.* Donating money to established humanitarian organizations that may or may not have been diverting funds to support al Qaeda cannot be considered primary participation in intentional wrongdoing expressly aimed at the United States. *Terrorist Attacks I,* 349 F.Supp.2d at 809 (citing *In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d 204, 208 (2d Cir.2003)).

As to Prince Salman's various limited contacts with the United States, they do not support general jurisdiction over him. The 1989 visit to the White House and Maryland is too far removed in time from the 2001 attacks. *See, e.g., Metro. Life Ins. Co.*, 84 F.3d at 569 (explaining that a defendant's "continuous and systematic" contacts with a forum must be examined over a period of time and finding a six-year period reasonable). Prince Salman's deceased son's contacts with the United States are irrelevant to this Court's analysis. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 ("Each defendant's contacts with the forum State must be assessed individually."). Prince Salman's ownership of shares in Texas corporations, on its own, cannot be considered sufficiently systematic and continuous to establish general jurisdiction. *Helicopteros,* 466 U.S. at 414-16, 104 S.Ct. 1868 (finding CEO's travel to fo-

rum for contract negotiations, employees' travel to forum for training, receipt of funds drawn on forum bank accounts, and purchase from forum companies were not contacts sufficiently systematic and continuous to establish general jurisdiction). Plaintiffs have not presented a genuine issue of jurisdictional fact such that discovery is necessary. *Daventree,* 349 F.Supp.2d at 761. Plaintiffs have not satisfied the constitutional requirement of showing that the Princes have minimum contacts with the United States. Accordingly, Prince Salman's and Prince Naif's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of personal jurisdiction are granted.

B. Rabita Trust[6]

Plaintiffs allege that Rabita Trust

> is a charitable organization which was created to organize the repatriation and rehabilitation of stranded Pakistanis from Bangladesh. Founded in 1988, the trust fund was started jointly by the government of Pakistan and the Saudi-based charity, [Defendant MWL]. Rabita Trust received the majority of its funding from the MWL and the Saudis, and [has] been involved with terrorism.

(*Ashton* Compl. ¶ 521; *Burnett* Compl. ¶ 268.) The charity initially received funding from its founders to help relocate 250,000 displaced refugees. (*Ashton* Compl. ¶ 522; *Burnett* Compl. ¶ 269.) Plaintiffs assert that Rabita Trust has actually relocated only a few hundred refugees. (*Ashton* Compl. ¶ 522; *Burnett* Compl. ¶ 269.)

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[6] Rabita Trust moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

On October 12, 2001, the United States Treasury Department designated Rabita Trust a Specially Designated Global Terrorist Entity and froze its assets.[7] (*Ashton* Compl. ¶ 312, 527; *Burnett* Compl. ¶ 236; *Federal* Compl. ¶¶ 117, 214.) Rabita Trust is allegedly related to various other charity Defendants and al Qaeda. For instance, as a subsidiary of MWL, it is a "sibling organization of the IIRO." (*Ashton* Compl. ¶ 525; *Burnett* Compl. ¶ 272; *Federal* Compl. ¶ 113.) Through MWL and its own officers, Rabita Trust is also related to the SAAR Network. (*Ashton* Compl. ¶¶ 338, 526-28; *Burnett* Compl. ¶¶ 273-75; *Federal* Compl. ¶ 213.) Plaintiffs claim that "Rabita Trust is an al Qaeda front" and that its General Director, Wa'el Julaidan, is a known al Qaeda member. (*Ashton* Compl. ¶ 523; *Burnett* Compl. ¶ 270; *Federal* Compl. ¶¶ 100, 121, 210.) In a list of orders obtained in a raid of BIF's Sarajevo's offices, investigators al-

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[7] Certain Defendants have been designated Specially Designated Global Terrorists ("SDGTs") pursuant to Executive Order 13224. In response to the attacks of September 11, President Bush issued Executive Order 13224 on September 23, 2001, pursuant to the authorities of the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. § 1601 *et seq.*, United Nations Participation Act of 1945, as amended, 22 U.S.C. § 287(c), and 3 U.S.C. § 301. The Secretaries of State and Treasury, in consultation with each other and the Attorney General, may designate individuals or entities if they determine the individual or entity has committed or poses the risk of committing acts of terrorism, or are owned or controlled by terrorists, or assist in or sponsor terrorism. As a result, the property and interests of the SDGT that come within the possession or control of U.S. persons are blocked. The process is intended to deter contributions to designated persons and entities and heighten public awareness regarding links to terrorism. *See* Executive Order 13224 Fact Sheet *available at* http://www.state.gov/s/ct/rls/fs/2002/16181.htm.

legedly recovered a document from Osama bin Laden regarding the management of Islamic charities in which he urged the creation of a committee to receive and distribute donations to al Qaeda and suggests Rabita Trust's participation. (*Federal* Compl. ¶¶ 195, 211.)

Rabita Trust claims that it does not have an office in the United States and that the complaints are devoid of any allegations that it directed money to terrorists. It admits that it has been designated a terrorist, but claims it does not have the same connections to the United States, bin Laden, and al Qaeda that Defendants Benevolence International Foundation ("BIF") and Adel A.J. Batterjee had. *See Terrorist Attacks I,* 349 F.Supp.2d at 823-25 (finding Court had personal jurisdiction over Mr. Batterjee based on his designation as a global terrorist, his role with BIF, another designated terrorist, his leadership of BIF's United States operations, and his relationship with Osama bin Laden). It also argues that the document that Plaintiffs attribute to Osama bin Laden is similar to the Golden Chain, in that it lacks foundation and authentification. *See Terrorist Attacks I.,* 349 F.Supp.2d at 817 ("The 'Golden Chain' is a group of documents that was discovered by Bosnian authorities searching the offices of charity Defendant BIF in March 2002. Plaintiffs claim the 'Golden Chain' contains a list of early direct donors to al Qaeda.")

In assessing whether Rabita Trust has purposefully directed its activities at the United States under Rule 4(k), the Court is mindful of the executive branch's designation of it as a SDGT. While the designation is not dispositive on its own, it does warrant some deference. In the realm of foreign affairs, the

executive branch has access to "confidential sources of information [and] agents in the form of diplomatic, consular and other officials." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Entities are designated under Executive Order 13224 if the executive branch determines they are involved in terrorist activities. *See* Executive Order 13224 Fact Sheet. Courts enjoy great discretion in deciding whether to order jurisdictional discovery before resolving motions to dismiss for lack of personal jurisdiction. *See, e.g., APWU v. Potter,* 343 F.3d 619, 627 (2d Cir.2003). This Court finds that such discovery would be helpful in assessing whether any of Rabita Trust's activities were directed at the United States. Accordingly, Rabita Trust's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied without prejudice.

C. Wa'el Jalaidan[8]

The United States Department of Treasury has designated Defendant Jalaidan a terrorist,[9] frozen his assets, and named him "one of the founders of al Qaeda." (*Ashton* Compl. ¶ 304; *Burnett* Compl. ¶ 255; *Federal* Compl. ¶¶ 117, 91.) The Treasury Department "characterized [him] as having 'directed organizations that have provided financial and logistical support to al-Qaida, [he] is the logistics chief of bin Laden's organization and fought on bin Laden's side in Afghanistan.'" (*Ashton* Compl. ¶¶ 304, 312, 523-24; *Burnett* Compl. ¶¶ 236, 255, 271; *Federal*

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[8] Wa'el Jalaidan moves to dismiss the *Ashton, Burnett,* and *Federal* complaints.

[9] At oral argument Plaintiffs alleged and Defendant heard for the first time, that Saudi Arabia and the United Nations have also designated him a terrorist.

Compl. ¶ 117; *see also Federal* Compl. ¶ 196 (claiming documents found in the Bosnian raid of BIF offices contained a note from Osama bin Laden to Jalaidan regarding al Qaeda's need for weapons).) Further, Osama bin Laden and his lieutenant, Abu Zubaydah, allegedly "have acknowledged Wa'el Julaidan as a known associate of their operations. Julaidan has been the head of various non-government organizations providing financial and logistical support to the al-Qa'ida network." (*Ashton* Compl. ¶¶ 304, 312, 341, 484; *Burnett* Compl. ¶¶ 236, 255.)

Jalaidan was in charge of the MWL in Peshawar, Pakistan and served as the General Director of Rabita Trust. (*Ashton* Compl. ¶ 304; *Burnett* Compl. ¶ 236, 255.) He "operated MWL offices that served in the early days of al Qaeda to attract and train holy warriors from around the world for the war in Afghanistan" and has "repeatedly aided and abetted terrorists." (*Ashton* Compl. ¶¶ 304, 312; *Burnett* Compl. ¶ 255.) Jalaidan is also allegedly connected to Defendant SJRC. (*Ashton* Compl. ¶ 484; *Federal* Compl. ¶ 125.)

Defendant Jalaidan argues that the allegations against him are simply allegations of guilt by association, and do not include any specificity regarding dates to put his actions in context. He urges the Court to not rely on his designation as a terrorist by the Treasury Department because he did not have an opportunity to rebut it.

Plaintiffs do not claim to have served Mr. Jalaidan in the United States under the ATA's nationwide service provision. Accordingly, Rule 4(k)(2) may provide a basis for personal jurisdiction. There are several federal claims at issue in this litigation and Plaintiffs have not made a prima facie showing that Mr. Jalai-

dan is subject to personal jurisdiction in New York or any other state. The Court turns to Mr. Jalaidan's contacts with the United States. In addition to being designated as a global terrorist by the Department of Treasury, Mr. Jalaidan is alleged to be a founder and the logistical chief of al Qaeda, and affiliated with several other charities that are allegedly in al Qaeda's fundraising network. In light of al Qaeda's public declarations of war against the United States, someone who is alleged to be a founder, an admitted associate, and a provider of financial and logistical support to al Qaeda, has purposefully directed his activities at the United States such that the exercise of personal jurisdiction over him is reasonable.[10] *See Mwani v. bin Laden*, 417 F.3d 1, 14 (C.A.D.C. 2005).

D. IIRO[11]

Plaintiffs claim that IIRO has "materially supported terror around the globe, including Osama bin Laden and al Qaeda." (*Ashton* Compl. ¶ 310; *Burnett* Compl. ¶¶ 234, 239; *Federal* Compl. ¶ 133.) In the early 1990s, IIRO "was rapidly becoming al Qaeda's foremost charity used as a means to transfer funds, personnel, and other means of material support." (*Burnett* Compl. ¶ 326; *Federal* Compl. ¶ 142.) Plaintiffs claim IIRO remains "firmly entrenched with Osama bin Laden's al Qaeda organization" because of its support of an al Qaeda guest house in Egypt, its office's close proximity to Osama bin

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[10] In reaching this conclusion, the Court did not consider the supplemental material that the *Burnett* and *Federal* Plaintiffs submitted in opposition to Mr. Jalaidan's motions to dismiss. (*See* Letter from Sean P. Carter to Court of June 23, 2005; Letter from Jodi Westbrook Flowers to Court of June 24, 2005.)

[11] IIRO moves to dismiss the *Ashton*, *Burnett*, and *Federal* complaints.

Laden's personal office in Sudan, and its relationship with bin Laden's brother-in-law Defendant Mohammed Jamal Khalifa. (*Ashton* Compl. ¶¶ 310, 315, 317; *Burnett* Compl. ¶¶ 234, 239, 241.)

Mohammed Jamal Khalifa headed IIRO's Philippines office, which served as a center of terrorist financing and training. (*Ashton* Compl. ¶ 310; *Burnett* Compl. ¶ 234; *Federal* Compl. ¶¶ 135-36.) Khalifa collected and laundered money for al Qaeda through IIRO's Phillipines office. (*Ashton* Compl. ¶ 316; *Burnett* Compl. ¶ 240.) Through Khalifa, IIRO was allegedly involved with bombings in Jordan in 1993 and 1994, the 1993 attack on the World Trade Center, plots to assassinate former President Bill Clinton and the late Pope John Paul II and to simultaneously blow up twelve American airliners, and the 1998 Embassy bombings in Africa. (*Ashton* Compl. ¶¶ 310, 318, 510-12; *Burnett* Compl. ¶¶ 189, 234, 239 240, 242; *Federal* Compl. ¶¶ 136, 137, 139.)

Plaintiffs claim IIRO supported al Qaeda terrorists in other ways as well. One of the September 11 hijackers claimed to be working for IIRO's Fazeh Ahed. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.) IIRO allegedly funded the Taliban regime with $60,000,000. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.) Pakistan deported 89 aid workers from the IIRO on the grounds that they were supporting al Qaeda. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246; *Federal* Compl. ¶ 144.) Plaintiffs claim IIRO funded al Qaeda training camps in Afghanistan. (*Ashton* Compl. ¶ 556; *Federal* Compl. ¶ 134 (basing allegations on declassified 1996 CIA report alleging IIRO funded six al Qaeda training camps, including those from which it planned, approved, and coordinated the September 11 attacks and where hijackers received

training and indoctrination).) IIRO funded Egyptian al-Jihad, a branch of al Qaeda. (*Burnett* Compl. ¶ 243.) IIRO conducted a joint fundraising event with al-Haramain and WAMY in Riyadh, Saudi Arabia in December 1999. (*Burnett* Compl. ¶ 156.)

Defendant MWL is the parent organization of IIRO and uses it as an "operational arm to perform many of its charitable activities." (*Ashton* Compl. ¶ 298; *Federal* Compl. ¶¶ 130-31.) Plaintiffs claim IIRO also works with numerous other charities allegedly affiliated with al Qaeda, including SJRC, BIF, Global Relief Foundation, Taibah International, Islamic African Relief Agency, and WAMY. (*Ashton* Compl. ¶ 320; *Burnett* Compl. ¶¶ 172, 244; *Federal* Compl. ¶ 147.) The FBI raided IIRO's offices in Virginia after September 11, 2001. (*Ashton* Compl. ¶ 322; *Burnett* Compl. ¶ 246.)

Plaintiffs allege that IIRO operates under the name International Relief Organization ("IRO") in the United States in Falls Church, Virginia, and that the IIRO and IRO transfer money to each other and have the same president. (*Ashton* Compl. ¶¶ 311, 320; *Burnett* Compl. ¶¶ 172, 235, 237; *Federal* Compl. ¶ 146 (U.S. branch established in 1991); *see also* Parrett Aff. Ex. 1 (attaching IRO's 1991 certificate of incorporation in Virginia); *id.* Ex. 2 (attaching IRO's 1993 certificate for doing business in Virginia under assumed name of International Islamic Relief Organization (IIRO)).) IIRO claims IRO was finally dissolved as a corporate entity in December 2002. (Saleh bin Abdallah Alsaikhan Decl. ¶ 10.)

The parties agree that this Court's exercise of personal jurisdiction over IIRO depends on its contacts with the United States as a whole under Rule 4(k)(1). The Court looks, therefore, at IIRO's contacts with

the United States. It appears that IIRO was operating in the United States until December 2002. It is alleged to have supported an al Qaeda guest house. Through its relationship with Mohammed Jamal Khalifa, it has allegedly been involved in several al Qaeda attacks and plots for other attacks. It has allegedly funded the Taliban and al Qaeda training camps in Afghanistan. The Court finds that Plaintiffs have made a prima facie case that IIRO has purposefully directed its activities at the United States, thus satisfying the constitutional minimum contacts requirement. IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied.

III. Failure to State a Claim

In these Rule 12(b)(6) motions to dismiss for failure to state a claim, the Court accepts as true the facts alleged in the complaints and draws all reasonable inferences in favor of Plaintiffs. *Harris v. City of New York,* 186 F.3d 243, 247 (2d Cir.1999). The complaints should be dismissed only if it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *Id.; see also Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema, N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (citing

Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168-69, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). Plaintiffs must still give Defendants fair and adequate notice of their claims and the grounds on which they rest. *See Simmons v. Abruzzo,* 49 F.3d 83, 86 (2d Cir.1995). "[W]hile *Swierkiewicz* made clear that pleading a *McDonnell Douglas prima facie* case was not necessary to survive a motion to dismiss, it did not even remotely suggest that a pleading could survive dismissal when it contained only the barest of conclusory allegations without notice of the factual grounds on which they purport to be based." *Jackson v. BellSouth Telecomms.,* 372 F.3d 1250, 1270-71 (11th Cir.2004).

The Court limits its review to the facts stated in the complaints, documents attached to the complaints as exhibits, and documents incorporated by reference in the complaints. *Dangler v. N.Y.C. Off Track Betting Corp.,* 193 F.3d 130, 138 (2d Cir.1999). For purposes of the RICO claims, the Court also reviews the RICO statements.

Plaintiffs claim that Defendants in these lawsuits are liable for the attacks of September 11, in most instances, as co-conspirators, aiders, or abettors with al Qaeda. The Court has held that Defendants may be responsible for the September 11 attacks if they knowingly and intentionally provided material support to al Qaeda. *See Terrorist Attacks I,* 349 F.Supp.2d at 826. The complaints' various theories of recovery merit a brief review here. *See id.* at 825-31.

The ATA provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of interna-

tional terrorism, or his or estate, survivors, or heirs." 18 U.S.C. § 2333(a). An act of international terrorism includes the provision of material support to terrorists, which is also a criminal act under the ATA. *Boim II*, 291 F.3d at 1015. The ATA's criminal provisions define "material support or resources" as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A(b); *see also Boim II*, 291 F.3d at 1015 (finding conduct that violates § 2339A would be sufficient to meet the definition of "international terrorism" in § 2333). This Court adopts the Seventh Circuit's requirement that Plaintiffs plead that Defendants knew of al Qaeda's illegal activities, "that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." *Id.* at 1023-24 (finding allegation that defendants are "'front' organizations with ostensibly legitimate purposes which are actually engaged in fund-raising and money laundering in support of terrorist activities" and that those defendants "supplied money to Hamas to fund terrorist operations" were sufficient to survive 12(b)(6) motion).

The ATCA provides a basis for relief when an alien sues for a tort committed in violation of the law of nations. 28 U.S.C. § 1350; *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995). Aircraft hijacking is considered a violation of international law, *Kadic*, 70 F.3d at 240, and the ATCA includes "actions premised on a theory of aiding and abetting and conspiracy." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 311 (S.D.N.Y.2003). The ATCA,

therefore, may provide a basis of recovery for those Plaintiffs who are aliens.

The *Federal* Plaintiffs include violations of civil RICO in their complaint. Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." *Id.*§ 1962(d). Section 1964 provides for a private right of action to enforce the statute. *Id.* § 1964. Plaintiffs must plead an injury resulting from conduct of an enterprise through a pattern of racketeering activity. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491 (1985).

In *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), the Supreme Court found that liability under § 1962(c) requires that a defendant be a participant "in the operation or management of the enterprise itself." *Id.* at 185, 113 S.Ct. 1163. The Court stated:

> Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is

> not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.

Id. at 179, 113 S.Ct. 1163. Therefore "to state a claim for liability under § 1962(c), Plaintiffs must allege that the [Defendants] participated 'in the operation or management of the enterprise itself,' which requires that these Defendants must have had some part in directing the enterprise's affairs." *Redtail Leasing, Inc. v. Bellezza*, No. 95 Civ. 5191(JFK), 1997 WL 603496, at *5 (S.D.N.Y. Sept.30, 1997).

The TVPA provides a cause of action against individuals who under actual or apparent authority of any foreign nation subject an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 note; *Arndt v. UBS AG*, 342 F.Supp.2d 132, 141 (E.D.N.Y.2004). The TVPA claims against Rabita Trust, IIRO, Success Foundation, and the SAAR Network entities are dismissed because these Defendants are not individuals. *Arndt*, 342 F.Supp.2d at 141. The TVPA claims against Tarik Hamdi, Abdulrahman Alamoudi, Wa'el Jalaidan, and the SAAR Network executives are dismissed because there is no allegation that these Defendants were acting under color of state law. *In re: South African Apartheid Litigation*, 346 F.Supp.2d 538, 548 (S.D.N.Y.2004) (finding no TVPA claim where complaint did not include allegation of individual acting under color of state law or with significant state aid).

Under New York law, Plaintiffs who are personal representatives who sufficiently allege that Defendants caused the death of their represented decedent will have also stated a claim for wrongful death and survival. N.Y. Est. Powers & Trusts Law §§ 5-4.1

(providing claim for wrongful death) and 11-3.2(b) (providing claim for survival).

Plaintiffs bring various torts claims against these Defendants. As the Court explained in *Terrorist Attacks I*, the *Federal* Plaintiffs' claims of assault, battery, and intentional infliction of emotional distress are time-barred, and therefore dismissed against Rabita Trust, Wa'el Jalaidan, IIRO, Tarik Hamdi, Abdulrahman Alamoudi, Mar-Jac Poultry, and the SAAR Network executives. *Terrorist Attacks I*, 349 F.Supp.2d at 829; N.Y. C.P.L.R. 215(3). To the extent the *Ashton* and *Burnett* Plaintiffs plead that Defendants are liable for the September 11 attacks as co-conspirators or aiders or abettors of al Qaeda, they will have pled a claim for relief for intentional infliction of emotional distress, which requires extreme and outrageous conduct, intent to cause severe emotional distress, a causal connection between the conduct and the injury, and severe emotional distress. *See Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir.1999). The *Federal* Plaintiffs' trespass claims require "the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir.1989). Provided the *Federal* Plaintiffs plead that Defendants here acted in concert with the September 11 hijackers, they will have stated a claim for relief for trespass. Finally, the negligence claims against the Defendants are dismissed because the complaints do not allege or identify a duty owed to Plaintiffs by these Defendants. *Terrorist Attacks I*, 349 F.Supp.2d at 830-31.

To summarize, the TVPA and negligence claims against all of the Defendants moving for dismissal

under Rule 12(b)(6) here are dismissed. The *Federal* claims of assault and battery and intentional infliction of emotional distress are also dismissed. The Court reviews the complaints to determine if they state a claim for relief under the ATA and RICO. If Plaintiffs state a claim for relief under the ATA, they will have also stated a claim for wrongful death and survival, the *Federal* Plaintiffs will have stated a claim for trespass, and the *Ashton* and *Burnett* Plaintiffs will have stated claims for intentional infliction of emotional distress. Plaintiffs who are aliens will have also stated a claim for relief under the ATCA.

A. Tarik Hamdi[12]

The *Burnett* and *Federal* Plaintiffs allege that after 1996, when Osama bin Laden declared war on Americans, Tarik Hamdi allegedly arranged for the delivery of a battery for a satellite phone used by Osama bin Laden. (*Burnett* Compl. ¶¶ 245, 581 (citing arguments of then-AUSA Kenneth Karas); *Federal* RICO Statement Ex. A.) Osama bin Laden allegedly used that phone and battery pack to coordinate and order the African embassy bombings. (*Federal* RICO Statement Ex. A.)

Plaintiffs also allege that Hamdi is affiliated with various al Qaeda operatives. For instance, he has connections with the Committee for the Defense of Legitimate Rights ("CDLR") and the Advice and Reformation Committee ("ARC"), two dissident Saudi groups with ties to Osama bin Laden. (*Burnett* Compl. ¶¶ 561-62.) A radical Arabic publication allegedly provided a phone number registered in Hamdi's name when it advertised the contact infor-

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[12] Tarik Hamdi moves to dismiss the *Burnett* and *Federal* complaints.

mation of CDLR's U.S. branch. (*Burnett* Compl. ¶ 580.) CDLR published bin Laden's October 12, 1996 fatwa on the Muslim Students Association listserve, the "MSA News." (*Burnett* Compl. ¶ 584.) Plaintiffs claim that ARC allegedly serves as al Qaeda's front in the United Kingdom and facilitates communication to and from Osama bin Laden. (*Burnett* Compl. ¶¶ 562, 564, 575, 577, 584-85.) Hamdi is also alleged to have connections to Khalid al-Fawwaz, one of the masterminds of the embassy bombings. (*Burnett* Compl. ¶ 582.) Finally, Plaintiffs claim Hamdi is a co-conspirator with the SAAR Network. He worked at IIIT in Herndon, Virginia, "the central address surrounding the SAAR Foundation raids, evidence and investigation." (*Burnett* Compl. ¶¶ 267, 583; *Federal* Compl. ¶ 146, 224.)

Hamdi asserts that he is a journalist. He argues that ABC requested that he arrange the interview with Osama bin Laden and that he did not purchase the phone or battery pack. He claims he has not had any ties to CDLR since 1995. He admits that he worked at IIIT as an editor. These factual disputes cannot be resolved on a 12(b)(6) motion.

The *Federal* Plaintiffs have not alleged that Mr. Hamdi participated in the operation or management of any enterprise. The RICO claims against Mr. Hamdi must be dismissed. *See Redtail Leasing, Inc. v. Bellezza,* 1997 WL 603496 at *5. Plaintiffs allege that Mr. Hamdi knew about bin Laden's terrorist activities at the time he procured a phone for him because the first fatwas had already been issued. They allege he provided material support to bin Laden in the form of a satellite phone battery. The ATA includes communications equipment in its definition of material support. *See* 18 U.S.C. § 2339A(b). "[E]ven

small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333." *Boim II,* 291 F.3d at 1015. These allegations are sufficient to notify Mr. Hamdi of the claims against him. Tarik Hamdi's motions to dismiss the *Burnett* and *Federal* complaints are denied.

B. Abdulrahman Alamoudi[13]

Defendant Abdulrahman Alamoudi has connections with several organizations that the *Burnett* and *Federal* Plaintiffs claim support terrorism. He is Vice President of Taibah International Aid Association's U.S. branch. (*Federal* Compl. ¶ 245.) Plaintiffs claim Taibah was implicated in the 1998 embassy bombings. (*Federal* Compl. ¶¶ 66, 239, 244.) Additionally, Taibah allegedly works closely with designated-terrorist Global Relief Fund and SHC and has diverted funds to al Qaeda and its affiliates in Bosnia. (*Federal* Compl. ¶¶ 241, 243.) Through Taibah, Alamoudi is also connected with several SAAR Network entities, including American Muslim Council, American Muslim Foundation, Hajj Foundation, Happy Hearts Trust, IIRO, and Success Foundation. (*Federal* Compl. ¶¶ 245, 490; *Burnett* Compl. ¶¶ 237, 248.) He allegedly used his SAAR connections to funnel money to al Qaeda through various fronts. (*Federal* Compl. ¶ 247.)

Plaintiffs allege that Alamoudi has openly stated his support for Hamas and Hezbollah, both designated terrorist organizations that cooperate with al Qaeda. (*Federal* Compl. ¶¶ 50, 53 *Burnett* Compl. ¶ 237.)

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[13] Abdulrahman Alamoudi moves to dismiss the *Burnett* and *Federal* complaints.

In August 2003, Alamoudi was detained at Heathrow Airport on his way to Syria. Customs officers seized approximately $340,000 in sequentially numbered bills, two U.S. passports, and one Yemeni passport. (*Federal* Compl. ¶ 246.) Alamoudi was arrested by U.S. officials at Washington Dulles Airport on September 28, 2003. (*Federal* Compl. ¶ 247.) He subsequently pleaded guilty to unlicensed travel to and commerce with Libya, false statements on his naturalization application, and tax offenses involving Libyan financial transactions. (*Federal* Mem. in Opp'n at 6.) He is currently serving a twenty-three year sentence. (*Id.*)

The *Burnett* complaint does not allege any act taken by Mr. Alamoudi that could be considered the provision of material support for al Qaeda. The *Federal* complaint is sustained inasmuch as it claims that Mr. Alamoudi funneled money to al Qaeda through the charities with which he was involved. (*Federal* Compl. ¶¶ 241, 243.) *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities [and] financial services" in definition of material support). This claim puts Mr. Alamoudi on notice that he is alleged to have provided financial material support to al Qaeda. Because the *Federal* complaint does not allege that Mr. Alamoudi had any role in directing an enterprise, however, the RICO claims against Mr. Alamoudi are dismissed. In sum, Mr. Alamoudi's motion to dismiss the *Burnett* complaint is granted; his motion to dismiss the *Federal* complaint is denied.

C. Success Foundation[14]

The Burnett Plaintiffs claim that Success Foundation is a sister company to Defendant IIRO and that it "sends money back and forth with the IIRO and IRO" and other sponsors of terror. (*Burnett* Compl. ¶ 235.) If given the opportunity to replead its allegations against Success, the Plaintiffs would allege that, in 1998, Success Foundation entered into a contract to act as an agent for Defendant Taibah, which has since been designated a global terrorist.

The complaint does not allege that Success Foundation knew the money it was transferring between IIRO and IRO would somehow assist al Qaeda, nor does it allege facts showing that Success Foundation knew the other unnamed organizations to which it transferred money were in the business of supporting terrorism. *See Boim II,* 291 F.3d at 1012 ("To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation."). The *Burnett* complaint is [sic] against Success Foundation is dismissed without prejudice.

D. Wa'el Jalaidan

For the reasons the Court found that it has personal jurisdiction over Mr. Jalaidan, the Court finds the Plaintiffs have stated a claim for relief against him. Plaintiffs have alleged facts, that if true, would be sufficient to prove that he knowingly provided material support to al Qaeda in the form of fi-

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[14] Success Foundation moves to dismiss the *Burnett* complaint.

nancial and logistical support. *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities, financial services, . . . weapons, [and] personnel" in definition of material support). The *Federal* complaint does not allege that Jalaidan directed an enterprise and the RICO claim is dismissed. Wa'el Jalaidan's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied

E. IIRO

Similarly, for the reasons the Court found that Plaintiffs made a prima facie demonstration that IIRO has purposefully directed its activities at the United States, the Court finds they have stated a claim under the ATA in that IIRO has allegedly funded al Qaeda training camps in Afghanistan, supported al Qaeda guest houses, and been involved in other terrorist attacks and plots. *See* 18 U.S.C. § 2339(A) (including "currency or other financial securities, financial services, . . . weapons, [and] personnel" in definition of material support). IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied.

F. Rabita Trust

Rabita Trust moves to dismiss the complaints against it for failure to state a claim. These motions are denied without prejudice until this Court determines whether it has personal jurisdiction over Rabita Trust.

G. SAAR Network Defendants[15]

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[15] Certain of these Defendants object to the label "SAAR Network Defendants," arguing there is no such entity and that, even if there were, Plaintiffs cannot agree as to which Defendants are included in the network. The Court refers to these

1. Entities

The *Burnett* and *Ashton* complaints' allegations against the SAAR Network entities are substantially similar to one another.[16] Paragraph 267 of the *Burnett* complaint and paragraph 339 of the *Ashton* complaint both state:

> Co-conspirators, material sponsors, and/or aiders and abettors of the SAAR Network include Defendants . . . African Muslim Agency, . . . Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar-Jac Investments, Inc., Mar-Jac Poultry, Inc., . . . Reston Investments, Inc., . . . Safa Trust, . . . and York Foundation, all located doing business or registered to do business in the United States.

In support of their claims against these Defendants, Plaintiffs rely primarily on their allegations against the "SAAR Foundation and network." (*See Burnett* Compl. ¶¶ 261-67; *Ashton* Compl. ¶¶ 333-39.) The SAAR Foundation, allegedly a financial sponsor of terror, was formed in the 1970s by a group of Muslim scholars and scientists. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.) It was incorporated in Virginia in 1983 and dissolved in December 2000. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.) Its largest donor

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Defendants under this label solely because Plaintiffs have so-identified these Defendants in their complaints.

[16] African Muslim Agency, Grove Corporate, Heritage Education Trust, IIIT, Mar-Jac Investments, Mar-Jac Poultry, Reston Investments, Safa Trust, and York Foundation move to dismiss the *Burnett* complaint. IIIT and Mar-Jac Poultry also move to dismiss the *Ashton* complaint. Mar-Jac Poultry moves to dismiss the *Federal* complaint as well.

is the al Rajhi family of Saudi Arabia. (*Burnett* Compl. ¶ 261; *Ashton* Compl. ¶ 333.)

The complaints claim that over one hundred "affiliated organizations" are registered or are doing business at one of the SAAR Foundation's addresses in Herndon, Virginia, but many "do not maintain a physical presence at that address, or elsewhere." (*Burnett* Compl. ¶ 262; *Ashton* Compl. ¶ 334.) The complaints further allege that many of the "SAAR Network" organizations' offices in Herndon were raided in March 2002 as part of Operation Greenquest to investigate "potential money laundering and tax evasion activities and their ties to terrorist groups such as . . . al Qaeda as well as individual terrorists . . . (including) Osama bin Laden." (*Burnett* Compl. ¶ 263; *Ashton* Compl. ¶ 335.) As noted above, Plaintiffs claim that the entity Defendants are among numerous co-conspirators, material sponsors, and/or aiders and abettors of the SAAR Network. (*Burnett* Compl. ¶ 267; *Ashton* Compl. ¶ 339.) The Plaintiffs also refer the Court to their allegations regarding charity sponsors of terror. (*See, e.g., Burnett* Compl. ¶¶ 150-53 (alleging, for example, that charity Defendants "are used as terrorist fronts, to mask money transfers and provide cover for terrorist operatives").) Additionally, the *Ashton* complaint claims that IIIT received its "operating expenses" from SAAR and "in turn financed two Florida charitable organizations accused of being cells for Islamic Jihad in Florida." (*Id.* ¶ 579.)

Unlike the SAAR Network entities whose motions to dismiss the *Federal* complaint the Court considered in its previous opinion and order, *see Terrorist Attacks I*, 349 F.Supp.2d at 822-23, these Defendants do not dispute that this Court has personal jurisdic-

tion over them. Although each of these moving Defendants filed a separate motion to dismiss, their arguments in favor of dismissal are similar.[17] They argue that, even "assum[ing] that plaintiffs have stated a claim against the 'SAAR Network,'" (*see, e.g.*, African Muslim Agency's Mem. in Supp. Mot. to Dismiss at 3, n.1) the complaints must be dismissed because they contain only conclusory allegations that they are "co-conspirator[s], material sponsor[s], and/or aider[s] and abettor[s] of the SAAR Network." (*Burnett* Compl. ¶ 267; *Ashton* Compl. ¶ 339.) Further, they argue that the complaints must be dismissed because they do not allege that they donated any money improperly, or with the knowledge that it would be given to Osama bin Laden, al Qaeda, or to any other charity allegedly funneling money to terrorists.

Plaintiffs offer the legal conclusion that the SAAR Network entities conspired with the SAAR Network. These Defendants, however, have no notice of the factual grounds on which Plaintiffs' claims of conspiracy are based. *See Jackson*, 372 F.3d at 1271 (explaining *Swierkiewicz* does not permit bare conclusory allegations without notice of the factual grounds on which they purport to be based); *see also Bodner v. Banque Paribas*, 114 F.Supp.2d 117, 125 (E.D.N.Y.2000) (noting the Second Circuit "has dismissed complaints which plead conspiracy in vague or conclusory terms and which do not allege specific instances of misconduct in furtherance of the con-

[17] The *Burnett* Plaintiffs filed one opposition brief in response to all of the SAAR Network entities' motions, except Mar-Jac Poultry. The *Ashton* Plaintiffs filed a single opposition brief in response to IIIT's and Mar-Jac Poultry's motions to dismiss. The *Burnett* and *Federal* Plaintiffs filed separate briefs opposing Mar-Jac Poultry's motions to dismiss.

spiracy"); *Ying Jing Gan v. City of New York*, 996 F.2d 522, 534 (2d Cir.1993) (explaining that on a Rule 12(b)(6) motion, "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness") (internal quotations omitted)). The *Burnett* complaint against African Muslim Agency, Grove Corporate, Heritage Education Trust, International Institute of Islamic Thought, Mar-Jac Investments, Mar-Jac Poultry, Reston Investments, Safa Trust, and York Foundation is therefore dismissed without prejudice. For the same reasons, the *Ashton* complaint against Mar-Jac Poultry is dismissed without prejudice.

The *Ashton* complaint alleges one action by IIIT in support of its claims—that it allegedly financed two charitable organizations in Florida accused of being Islamic Jihad cells. The complaint does not allege that IIIT knew these charities were Islamic Jihad cells or whether and how these cells participated in or contributed to al Qaeda's agenda of terror. *See Boim II*, 291 F.3d at 1011-12 (making donations to an alleged terrorist group, without "knowledge of and intent to further payee's violent criminal acts," cannot sustain cause of action). Accordingly, the *Ashton* complaint against IIIT is dismissed without prejudice.

In support of the claim that Mar-Jac Poultry is a material sponsor of terrorism, Plaintiffs allege two acts: first, that it donated money to African Muslim Agency, which the Plaintiffs claim was later "laundered," and second, that it donated money to unnamed SAAR Network entities, which was later forwarded to al Qaeda. (*See* Federal RICO Statement Applicable to SAAR Network Entities at 5(f) and Ex. A.) The RICO claim against Mar-Jac Poultry is dis-

missed because it is not alleged that Mar-Jac had any role in directing an enterprise, *see Redtail Leasing, Inc.*, 1997 WL 603496, at *5. The *Federal* complaint does not provide Mar-Jac Poultry with notice as to how it could be liable for the terrorist attacks. *See Boim II,* 291 F.3d at 1012 ("To hold the defendants liable for donating money without knowledge of the donee's intended criminal use of the funds would impose strict liability. Nothing in the language of the statute or its structure or history supports that formulation."). Mar-Jac's motion to dismiss the *Federal* complaint is therefore granted.

2. Executives

Taha Al-Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus are SAAR Network executives who are mentioned once in the *Federal* complaint in a long list of Defendants who allegedly "have aided and abetted, conspired with, and provided material support and resources to, defendant al Qaida and/or affiliated FTOs, associations, organizations or persons, as described herein." (*Federal* Compl. ¶ 66.) The complaint does not include any other allegations against these Defendants.

The *Federal* complaint alleges that Jamal Barzinji, another SAAR Network executive who moves to dismiss the complaint, is a Saudi national who, "through his various for-profit enterprises and involvement with charities and individuals operating within al Qaida's infrastructure, has long provided material support and resources to al Qaida." (*Federal* Compl. ¶¶ 490-91.) Barzinji has served as a board member of, or been associated with, several SAAR Network entities, including IIIT, WAMY, Safa Trust, Mar-Jac Poultry, and SAAR Foundation. *Id.* ¶ 490 (claiming that while he was the President of Safa Trust, he

"held authority over eighteen bank accounts"). He is a business associate of the designated terrorist Yousef Nada. (*Id.*) According to unnamed federal authorities, Barzinji "committed and conspired to: transit money internationally for the purpose of promoting offenses against foreign nations involving murder or the destruction of property by means of explosive, fire, kidnapping or extortion . . . ; provide material support or resources to foreign terrorist organizations . . . ; and provide material support or conceal or disguise the source of ownership of material support intended for use in preparation for or in carrying out a terrorist act." (*Id.*)

The RICO statement provides additional associations between each of these SAAR Network executives and the SAAR Network. (*See Federal* RICO Statement Applicable to the SAAR Network Executives at Ex. A (alleging in their roles as executives of SAAR Network entities, each of these Defendants committed multiple acts of conspiracy to commit multiple crimes).) Specifically, Taha Al-Alwani was President of IIIT and an officer of Heritage Education Trust; Muhammad Ashraf was an officer and/or director of Sterling Investment Group, Sterling Charitable Gift Fund, and York Foundation; M. Omar Ashraf was an officer and/or director of Grove Corporate Plaza, Mar-Jac Investments, and Sterling Charitable Gift Fund; Yaqub Mirza served as an officer and/or director of African Muslim Agency, Mar-Jac Investments, Mar-Jac Poultry, Reston Investments, SAAR Foundation, Safa Trust, where he was the principal signatory on Safa Group checks, and York International; Iqbal Yunus was a director of Child Development Foundation, a SAAR Network entity, and was associated with Sterling Charitable Gift Fund, and Sterling Management Group; finally, Jamal Barzinji

was president of Safa Trust and a director of Mar-Jac Poultry, Reston Investments, IIIT, and Safa Trust. (*Id.* at 5(f) and Ex. A.)

The complaint does not state a claim for relief against Taha Al-Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, or Iqbal Unus on a civil RICO theory or under the ATA. Reading the complaint as a whole and considering the overlap of executives among the SAAR Network entities, the complaint does not adequately provide these Defendants with notice as to how they provided material support to al Qaeda terrorists. *See Boim II*, 291 F.3d at 1023 (explaining a claim under the ATA must include allegation that defendant knew about terrorists' illegal activities, defendant wanted to help those activities succeed, and defendant engaged in an act of helping). The *Federal* complaint against Taha Al-Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus is dismissed without prejudice.

Jamal Barzinji controlled several bank accounts. (*Federal* Compl. ¶ 490.) He has allegedly transmitted money internationally for terrorist purposes. (*Id.*) He allegedly made these transfers to support al Qaeda. (*Id.* at ¶¶ 490-91.) The *Federal* Plaintiffs do not allege that Mr. Barzinji participated in the operation or management of their claimed RICO enterprise, and the RICO claim against him is dismissed. *Reves*, 507 U.S. at 179, 113 S.Ct. 1163. But Mr. Barzinji does have sufficient notice of the claims against him regarding his alleged provision of material support in the form of financial transactions to al Qaeda. *See* 18 U.S.C. § 2339(A) (including provision of "currency or other financial securities [and] financial services" in

definition of material support). Accordingly, his motion to dismiss the *Federal* complaint is denied.

IV. NCB's Motion for Reconsideration

In deciding NCB's motions to dismiss the *Ashton* and *Burnett* complaints, the Court ruled that NCB's status as a foreign sovereign for purposes of immunity under the FSIA was unclear. It also questioned whether it had personal jurisdiction over NCB. The Court ordered limited jurisdictional discovery on both issues. *Terrorist Attacks I*, 349 F.Supp.2d at 792, 820. In light of the possible lack of subject matter and personal jurisdiction, the Court refrained from deciding NCB's motion to dismiss for failure to state a claim. NCB moves for reconsideration of those decisions.

A. Standard

A motion for reconsideration is appropriate where a court overlooks "controlling decisions or factual matters that were put before it on the underlying motion . . . and which, had they been considered, might have reasonably altered the result before the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F.Supp.2d 390, 392 (S.D.N.Y.2000); *see also Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir.1995) ("The standard for granting a motion [for reconsideration] is strict, and . . . will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked. . . ."). A motion for reconsideration may also be granted to "correct a clear error or prevent manifest injustice." *Doe v. New York City Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir.1983).

B. The Court Will Consider NCB's Personal Jurisdiction Defense First

NCB offers two bases for reconsideration. First, NCB argues that even if the Court becomes assured of its subject matter and personal jurisdiction over NCB, Plaintiffs' claims are doomed because the Court dismissed similar claims against Al Rajhi Bank, Saudi American Bank, and Arab Bank. NCB contends that *Center for Reproductive Law & Policy v. Bush,* 304 F.3d 183, 194-95 (2d Cir.2002), supports its theory that the Court does not need to establish jurisdiction over NCB because the Court's dismissal of other Saudi banks "foreordains" NCB's dismissal on 12(b)(6) grounds. Alternatively, NCB urges the Court to limit this litigation's intrusion on Saudi Arabia and postpone resolution of its FSIA immunity defense until after the personal jurisdiction question is resolved.

The *Ashton* and *Burnett* Plaintiffs argue that the Court should not consider NCB's reliance on *Bush* because it was not raised in NCB's original motion to dismiss. Moreover, they are adamant that jurisdictional questions must be resolved first. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (internal citation and quotations omitted). And in Plaintiffs' view, the subject matter jurisdiction question must be resolved before the Court addresses personal jurisdiction. *See Reiss v. Societe Centrale Du Groupe Des Assurances Nationales,* 235 F.3d 738, 746 (2d Cir.2000) ("The initial question to be answered in this case is not

whether there is personal jurisdiction within the meaning of the New York [C.P.L.R.] but whether there is subject matter jurisdiction within the meaning of the [FSIA]."). Plaintiffs submit that it would be inefficient to separate the personal jurisdiction discovery from the FSIA discovery since the two inquiries are related. Finally, Plaintiffs argue that the Court's rulings on the other Saudi banks' Rule 12(b)(6) motions cannot apply to NCB because the allegations against the various banks are not identical.

In *Bush,* following the Supreme Court's instructions in *Steel Co.,* the district court dismissed the case for lack of subject matter jurisdiction after finding plaintiffs lacked standing to sue. On appeal, the Second Circuit found the case "exceptional," because twelve years earlier it had "entertained and rejected, on the merits, the same constitutional challenge to the provision at issue." *Bush,* 304 F.3d at 186; *see also Planned Parenthood Fed. of Am. v. Agency of Int'l Devl.,* 915 F.2d 59 (2d Cir.1990) (rejecting same constitutional challenge to same governmental provision). It explained two exceptions to the general rule that courts "ordinarily . . . are not to assume the existence of jurisdiction in favor of reaching an 'easier' merits issue." *Bush,* 304 F.3d at 193 (quoting *Fidelity Partners, Inc. v. First Trust, Co. of N.Y.,* 142 F.3d 560, 565 (2d Cir.1998)).

The only exception relevant here is "in those 'particular circumstances' where the outcome on the merits has been 'foreordained' by another case such that the 'jurisdictional question could have no effect on the outcome,' provided the court 'does not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise

would have gone unaddressed.'" *Bush*, 304 F.3d at 194 (quoting *Steel Co.*, 523 U.S. at 98, 118 S.Ct. 1003). The exception stems from *Secretary of Navy v. Avrech*, 418 U.S. 676, 94 S.Ct. 3039, 41 L.Ed.2d 1033 (1974), in which the Supreme Court dismissed a constitutional challenge to a governmental provision on the merits before reaching the jurisdiction question because the Court had earlier rejected a similar constitutional challenge to the same provision in *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). *See Bush*, 304 F.3d at 194 (describing *Avrech* and *Parker*). Accordingly, in *Bush*, the Second Circuit skipped the initial—and "novel"—standing question because that analysis would have been rendered "advisory" by "a controlling decision of this Court [that] has already entertained and rejected the same constitutional challenge to the same [governmental] provision." *Id.* at 195 (limiting holding to constitutional challenges to governmental provisions).

NCB's reliance on *Bush* cannot prevail here. The exception relied on in *Bush* is limited to constitutional challenges to governmental provisions. *Bush*, 304 F.3d at 195; *see also Steel Co.*, 523 U.S. at 99, 118 S.Ct. 1003. Here, the merits of NCB's liability for the attacks of September 11 do not present a constitutional challenge to a governmental provision such that skipping the jurisdiction question would be appropriate.

In its alternative argument for reconsideration, NCB requests that the Court postpone resolution of the subject matter jurisdiction question posed by the FSIA until NCB's personal jurisdiction defense is resolved. NCB argues that such a course would lead to its quicker dismissal from the litigation and would limit the intrusion into Saudi affairs since personal

jurisdiction discovery would involve only NCB's contacts with the United States and not Saudi Arabia's relationship to NCB.

The Supreme Court and Second Circuit agree that there are certain circumstances in which it is appropriate to give priority to the personal jurisdiction inquiry. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578, 588, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (holding "there is no unyielding jurisdictional hierarchy . . . [and] there are circumstances in which a district court appropriately accords priority to a personal jurisdiction inquiry" and finding no abuse of discretion where a court resolves a straightforward personal jurisdiction question before a novel subject matter jurisdiction question); *Cantor Fitzgerald v. Peaslee*, 88 F.3d 152, 155 (2d Cir.1996) (upholding district court's decision to dismiss for lack of personal jurisdiction before considering whether it had subject matter jurisdiction and finding "[o]n some occasions . . . considerations of judicial economy and restraint may persuade the court to avoid a difficult question of subject-matter jurisdiction when the case may be disposed of on a simpler ground"). Further, deference to foreign sovereigns under the FSIA "need not imply priority of immunity determination. . . . If one (or more) of the other jurisdictional defenses hold out the promise of being cheaply decisive, and the defendant wants it decided first, it may well be best to grapple with it (or them) first." *In re Minister Papandreou*, 139 F.3d 247, 254 (D.C.Cir.1998).

Here, the Court finds that the personal jurisdiction issue raised by NCB is "straightforward" when compared to the more "difficult" subject matter jurisdiction question posed by NCB's status within the Kingdom of Saudi Arabia. *See Ruhrgas*, 526 U.S.

at 588, 119 S.Ct. 1563; *see also Terrorist Attacks I,* 349 F.Supp.2d at 789-792 (analyzing NCB's status as a foreign sovereign). Additionally, NCB acknowledges that personal jurisdiction discovery will only involve it, its relationship to the Kingdom of Saudi Arabia is sufficiently remote that an inquiry into NCB's contacts with the United States will not intrude on the inner workings of the Kingdom's government. Finally, discovery regarding NCB's FSIA defense would necessarily subject the Kingdom to discovery, which the Court is hesitant to do unnecessarily. *See First City, Texas-Houston, N.A. v. Rafidain Bank,* 150 F.3d 172, 176 (2d Cir.1998); *see also Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 534 (5th Cir.1992) (recommending that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination").

For all the foregoing reasons, the Court reconsiders its order regarding simultaneous subject matter and personal jurisdiction discovery. *See Shrader,* 70 F.3d at 257 ("[I]n light of [defendant's] introduction of additional relevant case law . . . we cannot say that reconsider[ation is] an abuse of discretion."). Further inquiry into NCB's status as a foreign sovereign is postponed until the parties have completed their personal jurisdiction discovery and this Court has determined whether it has personal jurisdiction over NCB. *See Ruhrgas,* 526 U.S. at 588, 119 S.Ct. 1563; *In re Arbitration Between Monegasque De Reasurrances S.A.M.,* 311 F.3d 488, 498 (2d Cir.2002) (noting "dismissal for want of personal jurisdiction is independent of the merits and does not require subject-matter jurisdiction") (quoting *In re Minister Papandreou,* 139 F.3d at 255-56).

V. Conclusion

For the reasons explained above, SHC's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter jurisdiction is granted. Prince Salman's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter and personal jurisdiction is granted. Prince Naif's motion to dismiss the *Ashton, Burnett,* and *Federal* complaints for lack of subject matter and personal jurisdiction is granted. Rabita Trust's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied without prejudice. Wa'el Jalaidan's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against him are dismissed. IIRO's motions to dismiss the *Ashton, Burnett,* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against it are dismissed. Tarik Hamdi's motions to dismiss the *Burnett* and *Federal* complaints are denied, but the RICO, TVPA, negligence, and *Federal* intentional tort claims against him are dismissed. Abdulrahman Alamoudi's motion to dismiss the *Burnett* complaint is granted; his motion to dismiss the *Federal* complaint is denied, but the RICO, TVPA, intentional tort, and negligence claims are dismissed. Success Foundation's motion to dismiss the *Burnett* complaint is granted. The motions by African Muslim Agency, Grove Corporate, Heritage Education Trust, IIIT, Mar-Jac Investments, Reston Investments, Safa Trust, and York Foundation to dismiss the *Burnett* complaint are granted. IIIT's motion to dismiss the *Ashton* complaint is granted. Mar-Jac Poultry's motions to dismiss the *Burnett, Ashton,* and *Federal* complaints are granted. The motions to dismiss the *Federal* com-

plaint by Taha Al-Awani, Muhammad Ashraf, M. Omar Ashraf, M. Yaqub Mirza, and Iqbal Unus are granted. Jamal Barzinji's motion to dismiss the *Federal* complaint is denied, but the RICO, TVPA, intentional tort, and negligence claims against him are dismissed. National Commercial Bank's motion to reconsider the Court's January 18 opinion and order is granted to the extent that it requests the Court to consider its personal jurisdiction defense before resolving the FSIA issue.

So ordered.

APPENDIX E

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

Burnett v. Al Baraka Inv. & Dev. Corp.; Ashton v. Al Qaeda Islamic Army; Tremsky v. Qsama Bin Laden; Salvo v. Al Qaeda Islamic Army; Burnett v. Al Baraka Inv. & Dev. Corp.; Federal Insurance v. Al Qaida; Barrera v. Al Qaeda Islamic Army; Vigilant Insurance v. Kingdom of Saudi Arabia

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Nos. 03 MDL 1570(RCC), 02 CIV. 1616, 02 CIV. 6977, 02 CIV. 7300, 03 CIV. 5071, 03 CIV. 5738, 03 CIV. 6978, 03 CIV. 7036, 03 CIV. 8591.

In re: TERRORIST ATTACKS ON SEPTEMBER 11, 2001

Jan. 18, 2005.

Opinion and Order

CASEY, *District Judge*.

On September 11, 2001, nineteen members of the al Qaeda terrorist network hijacked four United States passenger airplanes and flew them into the twin towers of the World Trade Center in New York City, the Pentagon in Arlington, Virginia, and—due to passengers' efforts to foil the hijackers—an open field in Shanksville, Pennsylvania. Thousands of people on the planes, in the buildings, and on the ground were killed in those attacks, countless others

were injured, and billions of dollars of property was destroyed.

Pursuant to 28 U.S.C. § 1407, on December 9, 2003 the Multidistrict Litigation Panel centralized six then-pending September 11-related cases before this Court "for coordinated or consolidated pretrial proceedings." Additional actions, that are not the subject of this opinion, have since been filed. Plaintiffs in these consolidated actions are more than three thousand survivors, family members, and representatives of victims, and insurance carriers seeking to hold responsible for the attacks the persons and entities that supported and funded al Qaeda. The complaints allege that over two hundred defendants directly or indirectly provided material support to Osama bin Laden and the al Qaeda terrorists. Generally, these defendants fall into one of several categories: al Qaeda and its members and associates; state sponsors of terrorism; and individuals and entities, including charities, banks, front organizations, terrorist organizations, and financiers who provided financial, logistical, and other support to al Qaeda.[1] *See, e.g., Ashton* Complaint ¶ 5; *Burnett* Complaint "Introduction"; *Federal* Complaint ¶¶ 42-66. The complaints assert subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*; and causes of action under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note; the Antiterrorism Act ("ATA"), 18 U.S.C. § 2331 *et seq.*; the Alien Tort Claims Act ("ATCA"), 28 U.S.C.

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[1] According to Plaintiffs, Osama bin Laden formed al Qaeda, which means "the Base" or "the Vanguard," into an international terrorist organization with the aim of violently opposing non-Islam governments and Islamic states too beholden to the West. *See, e.g., Burnett* Complaint at 275.

§ 1350; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.;* theories of aiding and abetting, conspiracy, intentional infliction of emotional distress, negligence, survival, wrongful death, trespass, and assault and battery.

Several motions to dismiss are pending before the Court. At the suggestion of counsel, the Court scheduled oral arguments in groups organized generally by grounds for dismissal. On September 14, 2004, the Court heard oral argument on the motions to dismiss for lack of subject matter jurisdiction under the FSIA by HRH Prince Sultan bin Abdulaziz Al-Saud ("Prince Sultan"), HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud ("Prince Turki"),[2] and

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[2] Before the Multidistrict Panel transferred *Burnett v. Al Baraka Inv. & Dev. Corp.*, 02 Civ. 1616, to this Court, Judge Robertson of the United States District Court for the District of Columbia dismissed the claims against Prince Sultan relating to acts performed in his official capacity for lack of subject matter jurisdiction. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F.Supp.2d 9, 23 (D.D.C.2003) (hereinafter "*Burnett II*"). Finding that the court lacked personal jurisdiction over Prince Sultan, Judge Robertson dismissed without prejudice the allegations concerning acts taken in his personal, as opposed to official, capacity. *Id.* Judge Robertson dismissed the complaint against Prince Turki for lack of subject matter jurisdiction as well. *Id*

Prince Sultan and Prince Turki both move to dismiss the complaints against them in *Ashton v. Al Qaeda Islamic Army*, 02 Civ. 6977 (S.D.N.Y.); *Barrera v. Al Qaeda Islamic Army*, 03 Civ. 7036 (S.D.N.Y.); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 02 Civ. 1616 (D.D.C.); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 03 Civ. 5738 (S.D.N.Y.); *Salvo v. Al Qaeda Islamic Army*, 03 Civ. 5071 (S.D.N.Y.); and *Tremsky v. Osama bin Laden*, 02 Civ. 7300 (S.D.N.Y.). Plaintiffs in these cases filed consolidated responses to Prince Sultan's and Prince Turki's motions. In Plaintiffs' words, the New York *Burnett* action is materially identical

the National Commercial Bank ("NCB").[3] On October 12, 2004 the Court heard oral argument from Defendants who filed motions to dismiss for lack of per-

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to the D.C. *Burnett* action and was filed as a "prophylactic" measure in the event the D.C. court found that it lacked subject matter jurisdiction. *Burnett* Complaint at 265. Additionally, at Plaintiffs' counsel request, this Court ordered the *Barrera* action consolidated with the *Ashton* case on December 6, 2004.

Prince Sultan and Prince Turki have each also filed a separate motion to dismiss in *Federal Insurance v. Al Qaida,* 03 Civ. 6978 (S.D.N.Y.), both of which are fully submitted and are resolved in this opinion. The *Federal Insurance* Plaintiffs are forty-one insurance companies that have paid and reserved claims in excess of $4.5 billion as a result of the September 11 attacks.

The *Burnett* Plaintiffs filed a motion for reconsideration in conjunction with Prince Sultan's and Prince Turki's motions to dismiss certain consolidated complaints. While this Court reviews and gives deference to Judge Robertson's thoughtful opinion, it must evaluate Prince Sultan's and Prince Turki's motions on the merits de novo. *See In re Grand Jury Proceedings (Kluger),* 827 F.2d 868, 871 n. 3 (2d Cir.1987) ("A transfer under 28 U.S.C. § 1407 'transfers the action lock, stock, and barrel. The transferee district court has the power and the obligation to modify or rescind any orders in effect in the transferred case which it concludes are incorrect.'") (internal citations omitted). The Court bears in mind that it is bound by Second Circuit precedent while Judge Robertson applied D.C. Circuit law. *Menowitz v. Brown,* 991 F.2d 36, 40-41 (2d Cir.1993) (explaining transferee court is to apply its interpretation of federal law, not that of the transferor circuit); *In re Air Crash at Belle Harbor, New York,* No. 02 Civ. 8411(RWS), 2003 WL 124677, at *3 (S.D.N.Y. Jan. 15, 2003) (applying Second Circuit law after 28 U.S.C. § 1407 transfer from a district court in the Fifth Circuit).

[3] NCB moves to dismiss the complaints against it in *Ashton* and *Burnett.*

sonal jurisdiction, including Prince Sultan, HRH Prince Mohamed Al-Faisal Al-Saud ("Prince Mohamed"),[4] the estate of Mohammad Abdullah Aljomaih,[5] Sheikh Hamad Al-Husani,[6] NCB, Abdulrahman bin Mahfouz,[7] the Saudi Binladin Group, Tariq Binladin, Omar Binladin, and Bakr Binladin.[8] Although their counsel did not argue on that day, motions to dismiss by the African Muslim Agency, Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar-Jac Investments, Inc., Mena Corporation, Reston Investments, Inc., Safa Trust, Sana-Bell Inc., Sterling Charitable Gift Fund, Sterling Management Group, Inc., and York Foundation, (hereinafter collectively referred to as the "SAAR Network"),[9] Prince Turki, and Adel A.J. Batterjee,[10] also raised personal jurisdiction defenses. On October 14, 2004 the Court heard oral argument from certain Defendants arguing Plaintiffs had failed to state a claim, including Al Rajhi Banking & In-

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[4] Prince Mohamed moves to dismiss the complaints against him in *Ashton* and *Federal Insurance*.

[5] The estate of Mohammad Abdullah Aljomaih moves to dismiss the complaint in *Burnett*.

[6] Sheikh Hamad Al-Husani moves to dismiss the complaint in *Burnett*.

[7] Abdulrahman bin Mahfouz moves to dismiss the complaint in *Burnett*.

[8] The Saudi Binladin Group moves to dismiss the complaints against it in *Burnett* and *Ashton*. Tariq Binladin, Omar Binladin, and Bakr Binladin move to dismiss the *Burnett* complaint.

[9] The SAAR Network moves to dismiss the *Federal Insurance* complaint.

[10] Adel A.J. Batterjee moves to dismiss the complaint in *Burnett*.

vestment Corporation (hereinafter "Al Rajhi Bank"),[11] the Saudi American Bank,[12] Arab Bank,[13] NCB, the SAAR Network, Prince Mohamed, Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel,[14] Abdulrahman bin Mahfouz, the Saudi Binladin Group, and Adel A.J. Batterjee. Finally, the last of this group of motions was entertained on November 5, 2004, when the Court heard oral argument from the Kingdom of Saudi Arabia in its motion to dismiss the *Federal Insurance* complaint.[15]

I. Subject Matter Jurisdiction Under the FSIA

Under the FSIA, a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); 28 U.S.C. §§ 1602-1607. The FSIA's exceptions to immunity provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities in federal court. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S.

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[11] Al Rajhi Bank renews its motion to dismiss the *Burnett* complaint. Judge Robertson denied its original motion and permitted it to serve a Rule 12(e) request on the *Burnett* Plaintiffs. *Burnett v. Al Baraka Invest. & Dev. Corp.*, 274 F.Supp.2d 86, 110 (D.D.C.2003) (hereinafter "*Burnett I*").

[12] Saudi American Bank moves to dismiss the *Ashton* and *Burnett* complaints.

[13] Arab Bank moves to dismiss the *Burnett* and *Federal Insurance* complaints.

[14] Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel move to dismiss the *Ashton* and *Burnett* complaints.

[15] The parties have agreed that resolution of this motion will also apply to *Vigilant Insurance v. Kingdom of Saudi Arabia*, 03 Civ. 8591(RCC).

428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *Robinson v. Gov't of Malaysia,* 269 F.3d 133, 138 (2d Cir.2001). Federal courts must inquire at the "threshold of every action" against a foreign state whether the exercise of its jurisdiction is appropriate. *Verlinden B.V. v. Cent. Bank of Nigeria,* 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

A. Standard of Review

In a Rule 12(b)(1) motion to dismiss challenging subject matter jurisdiction under the FSIA, "the defendant must first 'present a prima facie case that it is a foreign sovereign.'" *Virtual Countries v. Republic of South Africa,* 300 F.3d 230, 241 (2d Cir.2002) (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1016 (2d Cir.1993)). In response, the plaintiff must present evidence that one of the statute's exceptions nullifies the immunity. *Virtual Countries,* 300 F.3d at 241 ("Determining whether this burden is met involves a 'review of the allegations in the complaint, the undisputed facts, if any, placed before the court by the parties, and—if the plaintiff comes forward with sufficient evidence to carry its burden of production on this issue—resolution of disputed issues of fact.'") (citing *Robinson,* 269 F.3d at 141); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah,* 184 F.Supp.2d 277, 287 (S.D.N.Y.2001) (explaining plaintiff may "rebut the presumption of immunity . . . by proffering evidence of record that the defendant undertook certain activities that fall within the scope" of one of the statutory exceptions) (citing *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadari,* 12 F.3d 317, 325 (2d Cir.1993)). In challenging this Court's subject matter jurisdiction, the moving Defendants retain the ultimate burden of

persuasion. *Virtual Countries*, 300 F.3d at 241 (citing *Cargill*, 991 F.2d at 1016); *Robinson*, 269 F.3d at 141 n. 8 (noting defendant's burden must be met with a preponderance of the evidence).

Defendants may "challenge either the legal or factual sufficiency of the plaintiff's assertion of jurisdiction, or both." *Robinson*, 269 F.3d at 140 (citations omitted). "If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Id.* (internal quotations and citations omitted); *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir.2000). "But where evidence relevant to the jurisdictional question is before the court, 'the district court . . . may refer to that evidence.'" *Robinson*, 269 F.3d at 140 (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000)); *see also Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998) (explaining, where there are factual disputes regarding the immunity question, the court may not "accept the mere allegations of the complaint as a basis for finding subject matter jurisdiction"). Thus, "on a 'challenge to the district court's subject matter jurisdiction, the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits.'" *Filetech*, 157 F.3d at 932 (explaining a court should consider all the submissions of the parties and may, if necessary, hold an evidentiary hearing to resolve the jurisdictional question) (quoting *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir.1991)). The court must consult outside evidence if resolution of a proffered factual issue may result in the dismissal of the complaint for lack of jurisdiction. *Robinson*, 269 F.3d at 141 n. 6. Defendants here challenge both the

legal and factual sufficiency of Plaintiffs' claims. The Court will consider the affidavits submitted by the parties as necessary.

Before turning to the allegations against the Defendants claiming immunity, the Court notes it is keenly aware of the "delicate balanc[e] 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign's agency's legitimate claim to immunity from discovery.'" *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir.1998) (ordering full discovery against defendant over whom court already had subject matter jurisdiction because such discovery would provide plaintiff an opportunity to obtain jurisdictional discovery regarding potentially sovereign alter ego co-defendant without further impinging that defendant's immunity) (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.1992) ("At the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination."). The Second Circuit has instructed "that generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until [plaintiff] has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." *First City*, 150 F.3d at 176-77 (quoting *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir.1990)). Still, the Plaintiffs must allege sufficient facts to warrant jurisdictional discovery. *Robinson*, 269 F.3d at 146 (citing *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir.1998) (refusing jurisdictional discovery where plaintiffs' allegations lacked factual specificity to confer jurisdiction)); *see also Burnett II*, 292 F.Supp.2d at 15 (denying Plaintiffs' request for discovery from Prince Turki where

"suggestions of [his] individual activity are only conclusory").

B. Allegations Against Defendants Asserting Foreign Sovereign Immunity

1. Prince Sultan

Prince Sultan has been Saudi Arabia's Minister of Defense and Aviation and Inspector General of its Armed Forces since 1962. *Ashton* Complaint ¶ 265; *Burnett* Complaint ¶ 352; *Federal* Complaint ¶ 427; William H. Jeffress, Jr. Decl. ¶ 4 at Notice of HRH Prince Sultan Bin Abdulaziz Al-Saud's Motion to Dismiss Consolidated Complaint (hereinafter "Consolidated Jeffress Decl."); Andrea Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss Consolidated Complaints Ex. 1, Sultan Bio, *available at http://saudiembassy.net/Country/Government/SultanBio.asp.* In 1982, his brother King Fahd bin Abdulaziz Al Saud named him Second Deputy President of Saudi Arabia's Council of Ministers, the Kingdom's governing body. Nizar Bin Obaid Nadani Decl. ¶ 2 at Notice of HRH Prince Sultan Bin Abdulaziz al-Saud's Motion to Dismiss Certain Consolidated Complaints Ex. 1 (hereinafter "Nadani Decl."); Consolidated Jeffress Decl. ¶ 4; *Federal* Complaint ¶ 427; Sultan Bio. As such, he is the third-highest ranking member of the Saudi government.

Especially relevant here, Prince Sultan is the Chairman of the Supreme Council of Islamic Affairs, which was established in 1995 and is responsible for the Kingdom's Islamic policy abroad. Consolidated Jeffress Decl. ¶ 5; *Ashton* Complaint ¶ 265; *Federal* Complaint ¶ 427. Prince Sultan disagrees with Plaintiffs' claim that the Supreme Council monitors and approves domestic and foreign charitable giving on

behalf of the Kingdom. Prince Sultan prefers the characterization that the Supreme Council "carr[ies] out the foreign policy of Saudi Arabia as determined by the Council of Ministers." Abdulaziz H. Al-Fahad Decl. ¶ 5, at Sara E. Kropf Decl. Ex. 2. Finally, Prince Sultan, as the head of the Special Committee of the Council of Ministers, which is a foreign policy advisory resource for King Saud, exercises authority over disbursements by the Special Committee. Consolidated Jeffress Decl. ¶ 6. In the past, these disbursements, which are government funded, have included grants to Islamic charities. *Id.* at ¶ 6.

The various complaints make substantially similar accusations against Prince Sultan. *See* Consolidated Jeffress Decl. Ex. C (summarizing allegations against Prince Sultan in consolidated complaints). Prince Sultan is alleged to have met with Osama bin Laden after Iraq invaded Kuwait in the summer of 1990. *Ashton* Complaint ¶ 253; *Burnett* Complaint ¶ 340. At that meeting, which Prince Turki also attended, bin Laden purportedly offered his family's support to Saudi military forces. *Ashton* Complaint ¶ 253. Plaintiffs allege that, at the time of the Gulf War, Prince Sultan "took radical stands against western countries and publicly supported and funded several Islamic charities that were sponsoring Osama bin Laden and al Qaeda operations." *Ashton* Complaint ¶ 266; *Burnett* Complaint ¶ 353. After the attacks of September 11, Prince Sultan allegedly advocated against granting the United States use of Saudi military bases to stage attacks against Afghanistan. *Ashton* Complaint ¶ 273; *Burnett* Complaint ¶ 356.

Prince Sultan allegedly made personal contributions, totaling $6,000,000 since 1994, to various Islamic charities that Plaintiffs claim sponsor or sup-

port al Qaeda. *Ashton* Complaint ¶ 269; *Burnett* Complaint ¶ 359; *Federal* Complaint ¶ 430. The specific charities that Prince Sultan donated to include Defendants International Islamic Relief Organization ("IIRO"),[16] Al Haramain,[17] Muslim World League ("MWL"),[18] and the World Assembly of Muslim Youth ("WAMY").[19] *Ashton* Complaint ¶¶ 269-272; *Burnett* Complaint ¶¶ 354, 359; *Federal* Complaint ¶ 430. According to Plaintiffs, with respect to his alleged donations, "[a]t best, Prince Sultan was grossly negligent in the oversight and administration of charitable funds, knowing they would be used to sponsor international terrorism, but turning a blind eye. At worse, Prince Sultan directly aided and abetted and materially sponsored al Qaeda and international terrorism." *Burnett* Complaint ¶ 363; *Federal* Complaint ¶¶ 429-31 (alleging Prince Sultan knew and intended that the contributions he made to various charities would

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[16] IIRO is allegedly an al Qaeda front that has been tied to the 1993 World Trade Center attack and the 1998 embassy bombings. *See, e.g., Burnett* Complaint ¶¶ 156, 240, 242.

[17] Beginning in 2002, certain branches of Al Haramain were designated by the United States as terrorist organizations. *See* Exec. Order No. 13224, 31 C.F.R. 595, *available at* http://www.treas.gov/offices/enforcement/ofac/sanctions/t11ter.pdf hereinafter "Exec. Order No. 13224"). Judge Robertson denied Al Haramain's motion to dismiss the *Burnett* action. *Burnett I*, 274 F.Supp.2d at 107.

[18] MWL is the parent of IIRO. *See, e.g., Burnett* Complaint ¶ 236.

[19] WAMY is a suspected al Qaeda front, allegedly "preaching good . . . while plotting evil," connected to charity Defendant Benevolence International Foundation ("BIF"). BIF is now a designated terrorist, but it previously concealed its relationship with Osama bin Laden and al Qaeda. *See, e.g., Burnett* Complaint ¶¶ 160, 205, 229, 362; Exec. Order 13224.

be used to fund al Qaeda and international terrorism).[20]

2. Prince Turki

Prince Turki is currently the Kingdom of Saudi Arabia's ambassador to the United Kingdom. *Ashton* Complaint ¶ 263. From 1977 until August 2001, he was the Director of Saudi Arabia's Department of General Intelligence ("DGI," also known by its Arabic name, Istakhbarat). *Ashton* Complaint ¶ 255; *Burnett* Complaint ¶ 343; *Federal* Complaint ¶ 445. As such, Plaintiffs allege he was or should have been aware of the terrorist threat posed by Osama bin Laden, al Qaeda, and the Taliban. *Ashton* Complaint ¶ 256; *Burnett* Complaint ¶ 343. Prince Turki allegedly met with Osama bin Laden five times in the mid-1980s

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[20] Prince Sultan denies making any grants to Al Haramain and MWL and argues that contributions made to IIRO and WAMY were made strictly in his official capacity on behalf of the Saudi government. Further, he claims the four charities searched their records and confirmed that Prince Sultan did not make any personal contributions. These transmittal letters and government checks were included in Prince Sultan's motion to dismiss the D.C. *Burnett* action. Judge Robertson found these documents had "limited probative value, [as they] lack[ed] proper foundations to establish that the affiants could have known the actual source of the moneys they received." *Burnett II*, 292 F.Supp.2d at 16. This Court has reviewed these affidavits and agrees with Judge Robertson's assessment. For example, one declarant who provided information regarding alleged contributions relied on his personal knowledge of a charity's records, yet he had only been in his position for two months. *See* Decl. of Saleh Abdullah Al Saykhan ¶ 2, at Decl. of Sara E. Kropf in Support of Prince Sultan's Motion to Dismiss the D.C. *Burnett* action. As Judge Robertson pointed out, "the value of plaintiffs' showing that Prince Sultan did give money to these organizations in his personal capacity, however, is no greater." *Burnett II*, 292 F.Supp.2d at 16 (referring to Saudi press reports of Prince Sultan's contributions).

and mid-1990s. *Ashton* Complaint ¶ 257; *Burnett* Complaint ¶ 344. At one of those meetings, which Prince Sultan also attended, bin Laden allegedly offered the Saudis the use of his family's engineering equipment and suggested bolstering Saudi military forces with militants. *Ashton* Complaint ¶ 253. Prince Turki is alleged to have close ties with an al Qaeda financier, Mr. Zouaydi, and is allegedly implicated in Mr. Zouaydi's financial support of al Qaeda. *Ashton* Complaint ¶ 241; *Burnett* Complaint ¶ 345. Further, Plaintiffs claim Prince Turki met with members of the Taliban and, in 1995, gave the Taliban financial and material support. *Ashton* Complaint ¶ 257; *Federal* Complaint ¶¶ 447-48 (alleging that, at the time Prince Turki provided support, the Taliban maintained a symbiotic relationship with al Qaeda and thus Prince Turki knew al Qaeda would benefit from the Kingdom's support). In July 1998, Prince Turki is alleged to have met with members of the Taliban and representatives of bin Laden and agreed to not extradite bin Laden or close terrorist camps in exchange for bin Laden's protection of the Saudi Royal family. *Ashton* Complaint ¶ 261; *Burnett* Complaint ¶ 348. Plaintiffs allege Prince Turki facilitated money transfers from wealthy Saudis to the Taliban and al Qaeda. *Ashton* Complaint ¶ 259; *Federal* ¶ 451. Additionally, the *Federal* Plaintiffs claim that, while Prince Turki was the head of DGI, Saudi Arabian intelligence officers allegedly trained a member of the al Qaeda Spanish cell in explosives and provided material support to two of the September 11 hijackers. *Federal* Complaint ¶ 449. The *Federal* complaint also alleges that Prince Turki made personal contributions to Saudi-based charities that he knew were sponsors of al Qaeda, including IIRO, MWL, WAMY, BIF, the Saudi High Commission, Saudi Joint Relief

Committee for Kosovo and Chechnya ("SJRC"), and Al Haramain. *Federal* Complaint ¶¶ 451-52.

Prince Turki denies the allegations against him in a declaration prepared in concert with his motion to dismiss the D.C. *Burnett* action. In reviewing this declaration, the Court gives "great weight to any extrinsic submissions made by the foreign defendant[ ] regarding the scope of [his] official responsibilities." *Leutwyler,* 184 F.Supp.2d at 287 (internal quotation marks omitted). Prince Turki explains that the DGI "is involved in the collection and analysis of foreign intelligence and in carrying out foreign operations." Decl. of HRH Prince Turki ¶ 5, at HRH Prince Turki's Motion to Dismiss Certain Consolidated Complaints Ex. 1 (hereinafter "Prince Turki Decl."). He was active in Saudi Arabia's efforts to combat terrorism generally and the threat posed by Osama bin Laden and al Qaeda specifically, and served on a joint information-sharing committee with the United States beginning in 1997. *Id.* ¶¶ 6, 10. He states that all of his interactions with Osama bin Laden and the Taliban were part of his official functions. *Id.* ¶ 5. In June 1998, King Fahd sent Prince Turki to Kandahar to meet with the Taliban and to relay the official Saudi request that Osama bin Laden be extradited to Saudi Arabia for trial. *Id.* ¶ 11. The Taliban denied the Saudi request and Saudi Arabia subsequently suspended diplomatic relations with the Taliban in September 1998. *Id.* ¶ 13. Prince Turki denies facilitating money transfers to Osama bin Laden or al Qaeda, he denies offering material assistance to Osama bin Laden, his representatives, or al Qaeda in return for their not attacking Saudi Arabia, he denies promising or providing oil or financial assistance to the Taliban, and denies ever hearing of the Syrian

financier Mr. Zouaydi, with whom he is alleged to have ties. *Id.* ¶¶ 14, 16, 17.

3. Kingdom of Saudi Arabia

The *Federal* Plaintiffs claim that "[m]ore than any other factor, al Qaida's phenomenal growth and development into a sophisticated global terrorist network were made possible by the massive financial, logistical and other support it received from the Kingdom of Saudi Arabia, members of the Saudi Royal family, and prominent members of Saudi society." *Federal* Complaint ¶ 398. Further, the *Federal* Plaintiffs allege September 11 was "a direct, intended and foreseeable product of the Kingdom of Saudi Arabia's participation in al Qaida's jihadist campaign." *Id.* ¶ 425. Specifically, the Kingdom allegedly maintained and controlled several of the charities within al Qaeda's infrastructure. *Id.* ¶ 399. The *Federal* Plaintiffs claim Saudi Arabia knew the threat that these charities posed particularly to the United States, and did nothing to stop it. *Id.* ¶¶ 400-02. The Kingdom allegedly used its relationship with the Taliban to sustain al Qaeda in the mid-1990s. *Id.* ¶¶ 403, 407. To the extent the *Federal* Plaintiffs rely on actions by members of the Saudi Royal family as allegations against the Kingdom, they make no claim that these individuals were acting on behalf of or at the behest of the Kingdom. *See, e.g., id.* ¶ 420 (claiming that in January 1999 Princess Haifa made payments to Al-Bayoumi, a Defendant alleged to have paid rent on behalf of two of the hijackers). Finally, Plaintiffs allege that members of the Saudi Royal family provided support to al Qaeda in their official capacities as members of the Supreme Council of Islamic Affairs. *Federal* Complaint ¶¶ 426-464.

4. National Commercial Bank

NCB was established in 1950 by Salim bin Mahfouz, the father of Defendant Khalid bin Mahfouz, as the first commercial bank of Saudi Arabia. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88. The *Ashton* Plaintiffs allege that the bin Mahfouz family controlled NCB until 1999 when the Saudi government bought a majority of its shares. *Ashton* Complaint ¶ 573.[21] The *Ashton* and *Burnett* Plaintiffs claim that NCB has a wholly-owned subsidiary in New York, SNCB Securities, Ltd., through which it operates an international banking business. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88.

Plaintiffs claim Osama bin Laden and al Qaeda used NCB as "a financial arm, operating as a financial conduit for [their] operations." *Ashton* Complaint ¶ 564; *Burnett* Complaint ¶ 89. In 1986, Khalid bin Mahfouz became NCB's President and CEO and remained so until 1999. *Ashton* Complaint ¶ 563; *Burnett* Complaint ¶ 88. Also in 1986, Khalid bin Mahfouz became the Chief Operating Officer and a major shareholder of the Bank of Credit and Commerce International ("BCCI"). *Ashton* Complaint ¶¶ 564, 566; *Burnett* Complaint ¶¶ 89, 91. He was subsequently indicted in New York state in connection with his involvement in BCCI's fraudulent practices, which also implicated NCB. *Ashton* Complaint ¶¶ 564, 566; *Burnett* Complaint ¶¶ 89, 91.

Plaintiffs claim both NCB and BCCI supported international terrorism. *Ashton* Complaint ¶¶ 564-68;

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[21] The *Ashton* Plaintiffs moved to amend this allegation to claim that the Public Investment Fund ("PIF"), not the Saudi government, purchased a majority of NCB shares in 1999. *Ashton* Docket 137, 138.

Burnett Complaint ¶¶ 91-93. Specifically, a "1999 United States Senate Report on the BCCI scheme detailed the role of [NCB] in hiding assets, money laundering, the cover-up and obstruction of a Senate investigation, and sponsoring international terrorism." *Burnett* Complaint ¶ 89. Additionally, a 1998 NCB bank audit revealed irregularities involving direct donations to several charities and that $74 million had been funneled by the bank's Zakat Committee to IIRO.[22] *Ashton* Complaint ¶¶ 569-71; *Burnett* ¶¶ 94, 95. NCB also allegedly made loans to charitable organizations without the knowledge of the Zakat Committee. *Id.* Plaintiffs allege "direct donations were received through NCB facilities to the Red Crescent Committee,. [IIRO], and the Muwaffaq Foundation," all Defendants in these actions. *Ashton* Complaint ¶ 570; *Burnett* Complaint ¶ 95. Muwaffaq allegedly provided Osama bin Laden with $3 million in 1998. *Ashton* Complaint ¶ 573. Plaintiffs claim NCB knew or should have known it was materially supporting al Qaeda, Osama bin Laden, and international terrorism. *Ashton* Complaint ¶ 570; *Burnett* Complaint ¶ 95.

C. Defendants' Status as Foreign States for FSIA Purposes

The Court must first determine if the moving Defendants are "foreign states" for purposes of the FSIA. A "foreign state" is statutorily defined:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

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[22] Zakat is required almsgiving by all Muslims. *See, e.g., Burnett* Complaint at 275; *id.* ¶ 40

> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603. There is no dispute that the Kingdom of Saudi Arabia is a foreign state. The status of each of the Princes and NCB are discussed below.

1. Prince Sultan and Prince Turki

Several courts have recognized that "[i]mmunity under the FSIA extends also to agents of a foreign state acting in their official capacities [since] '[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.'"[23] *Bryks v. Canadian Broad. Corp.*, 906 F.Supp. 204, 210 (S.D.N.Y.1995) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir.1990) ("Nowhere in the text or legislative history does Congress state that individuals are not encompassed within 28 U.S.C. § 1603(b).")); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir.2004) (collecting cases extending FSIA immunity to individuals sued

[23] The FSIA is silent on the subject. Neither the Supreme Court nor the Second Circuit has specifically addressed the issue.

in their official capacities); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir.1999) (acknowledging the FSIA protects individuals to the extent they act within their official duties); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C.Cir.1996) (dismissing claims against government officials since they were sued in their official capacities); *Leutwyler*, 184 F.Supp.2d at 286-87 ("[I]t has been generally recognized that individuals employed by a foreign state's agencies or instrumentalities are deemed 'foreign states' when they are sued for actions undertaken within the scope of their official capacities.") (citing *Bryks*, 906 F.Supp. at 210); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 11 n. 3 (D.D.C.1998) (noting favorable practice of applying FSIA to individuals). Thus, this Court finds that immunity may be available to Prince Sultan, as the third-highest ranking member of the Saudi government, and to Prince Turki, as the Director of Saudi Arabia's Department of General Intelligence, to the extent their alleged actions were performed in their official capacities.

The *Federal* Plaintiffs argue that the FSIA cannot apply to Prince Turki because, as of September 10, 2003 when the complaint was filed, Prince Turki was the Saudi ambassador to the United Kingdom, a position the *Federal* Plaintiffs allege is not entitled to immunity under the FSIA. In support of this argument, the *Federal* Plaintiffs cite *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003), in which the Supreme Court held that instrumentality status is determined at the time of the filing of the complaint.

The Court disagrees with this reliance on *Dole Food*. The Supreme Court resolved two questions in

Dole Food. "The first [was] whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary. The second question [was] whether a corporation's instrumentality status is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time the suit is filed." *Id.* at 471, 123 S.Ct. 1655. The Supreme Court held that a foreign state's ownership of an entity must be direct for the entity to be considered an instrumentality. *Id.* at 474, 123 S.Ct. 1655. The Supreme Court also ruled that ownership must be determined as of the date on which the complaint was filed. *Id.* at 480, 123 S.Ct. 1655. Neither of these points of law speaks, however, to the circumstances under which an individual is covered by the FSIA. Indeed, numerous other courts that have addressed this issue have held that the relevant inquiry for individuals is simply whether the acts in question were undertaken at a time when the individual was acting in an official capacity. *See, e.g., Velasco,* 370 F.3d at 398-99; *Byrd,* 182 F.3d at 388; *Bryks,* 906 F.Supp. at 210. This Court considers that precedent to be more consistent with the FSIA and unaltered by the decision in *Dole Food.* Thus, it deems Prince Turki the equivalent of the foreign state inasmuch as the complaints allege actions taken in his official capacity as the head of the DGI. Accordingly, both Prince Sultan and Prince Turki are immune from suit for their official acts unless an exception under the FSIA applies.

2. National Commercial Bank

NCB submits that it is an instrumentality of the Kingdom of Saudi Arabia and therefore immune from

suit. *See* Decl. of Nizar Bin Obaid Madani, Assistant Minister of Foreign Affairs of Kingdom of Saudi Arabia ¶ 2, at Berger Decl. Ex. 7 ("It is the position of the Ministry of Foreign Affairs that NCB is a government instrumentality of the Kingdom of Saudi Arabia."). To enjoy immunity from suit under the FSIA, NCB must demonstrate that it is an agency or instrumentality, or a political subdivision of the Kingdom. 28 U.S.C. § 1603(a). As explained above, the FSIA defines an "agency or instrumentality" as (1) "a separate legal person, . . . (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) a non-U.S. citizen. 28 U.S.C. § 1603(b). Accordingly, NCB claims that (1) it is a separate legal person, (2) at the time the suit was filed a majority of its shares were owned by an administrative unit of the Saudi Ministry of Finance, the Public Investment Fund ("PIF"),[24] and (3) it is not a citizen of the United States or created under the laws of a third country.

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[24] After the parties submitted their briefs and argued the FSIA issue, the *Ashton* Plaintiffs filed supplemental affidavits, without leave of the Court, to contest, for the first time, the timing of the PIF's majority ownership. *See* 03 MD 1570 Docket # 455. The parties agree that the PIF bought 50% of NCB shares in May 1999. *See* John Fawcett Sept. 23, 2004 Supplemental Affidavit at Ex. 1 ("Fawcett Supp. Aff."). Later in 1999, the PIF sold 10% of its shares to the General Organization for Social Insurance. Fawcett Supp. Aff. at Ex. 2. Late in 2002 the PIF agreed to buy 30% of the remaining shares from the bin Mahfouz family, but Plaintiffs claim the purchase was not completed until January 2003, after the lawsuit was filed on September 4, 2002. *See* Fawcett Supp. Aff. at Ex. 3 & 4 (news accounts of sale). For the reasons that will be explained below, the Court finds it unnecessary to resolve this dispute at this time.

In *Dole Food,* the Supreme Court held "that only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" outlined in § 1603(b). 538 U.S. at 474, 123 S.Ct. 1655. Accordingly, the Kingdom of Saudi Arabia's ownership of NCB must be direct for NCB to enjoy immunity under the FSIA. That is, NCB will not be deemed an instrumentality of the Kingdom if the PIF, its majority owner, is determined to be an agency, instrumentality, or organ of the Kingdom. *See* § 1603(b)(2) (stating agency or instrumentality is entity whose majority ownership interest is held by either the foreign state or a political subdivision thereof); *Filler v. Hanvit Bank,* 378 F.3d 213 (2d Cir.2004) (holding an organ's ownership of two banks did not, in turn, make the banks organs or instrumentalities of foreign state); *see also In re Ski Train Fire in Kaprun, Austria,* 198 F.Supp.2d 420, 426 (S.D.N.Y.2002) (holding ski resort owner, which was owned in part by instrumentality of Austrian government, was not instrumentality because it was not owned directly by the state or a subdivision thereof); *Hyatt Corp. v. Stanton,* 945 F.Supp. 675, 688 (S.D.N.Y.1996) (concluding "that corporations a majority of whose shares are owned by agencies or instrumentalities of foreign states are not themselves agencies or instrumentalities"). Thus, NCB must demonstrate that the PIF is the equivalent of the Kingdom of Saudi Arabia or a political subdivision thereof.

The PIF was established by Royal Decree with the sole function of "financing . . . investments in productive projects of a commercial nature whether they belong to the Government or the industrial lending institutions connected to it or to its public corporations and whether these projects are undertaken in-

dependently or in partnership between these administrative parties and private institutions." PIF Charter ¶ 2, at Berger Aff. Ex. 4B ("PIF Charter"); Affidavit of Abdallah Bin Hamad Al-Wohaibi ¶ 3, the Director of the Legal Department of the Ministry of Finance, at Berger Aff. Ex. 4 ("Al-Wohaibi Aff."). Its board of directors are all Saudi officials named in its charter, its employees are civil servants, and the Ministry of Finance is responsible for its costs. *Id.* ¶¶ 4, 8, 10; *see also* PIF Charter ¶¶ 4, 7. Its board must submit an annual report to Saudi Arabia's Council of Ministers summarizing its financial position and major operations. Al-Wohaibi Aff. ¶ 10. It has no separate legal status from the Ministry of Finance. *Id.* ¶ 4. The PIF holds shares of corporations and operational assets, "generally . . . on behalf of the Ministry of Finance." *Id.* ¶ 9. It may be sued as a department of the Ministry of Finance, and as such, the Ministry of Finance would be named as the defendant. *Id.* ¶ 12. It funds investments on behalf of the Kingdom and it provides financing terms for projects that commercial lenders do not. *Id.* ¶ 5; Supplemental Al-Wohaibi Aff. ¶¶ 8-10 (hereinafter "Supp. Al-Wohaibi Aff.").

a. Status of the PIF

In *Filler v. Hanvit Bank,* a case with facts very similar to those presented here, the Second Circuit reiterated *Dole Food's* requirement of direct ownership for instrumentality status. Two defendants were commercial banks majority-owned by the Korean Deposit Insurance Corporation ("KDIC"), a "governmental institution" run by the Korean Ministry of Finance and the Economy of the Republic of Korea. *Filler,* 378 F.3d at 215-16. In determining if KDIC

was an organ of Korea, the court considered several factors:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. at 217 (citing *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir.2000) (alteration in original)). The Second Circuit held that the KDIC was an organ of Korea because it was formed by statute and presidential decree; it performs the governmental functions of protecting depositors and promoting financial stability; its directors are appointed by the Ministry of Finance and Economy; its president is appointed by the President of the Republic of Korea; and many of its operations are overseen by the Ministry of Finance and Economy. *Id.*

The banks argued that once the court determined KDIC was an organ of the foreign state, the banks automatically became instrumentalities or agencies of the state because KDIC owned a majority of their stock. *Id.* The Second Circuit rejected this argument, finding such a holding would "permit an infinite number of subsidiaries to enjoy sovereign immunity, . . . would be incompatible with the purpose of the FSIA, which is to grant governmental, not private corporate immunity, and . . . would reflect infidelity to the Supreme Court's reasoning in *Dole Food*." *Id.* at 218. Accordingly, it reiterated that "'a subsidiary of an instrumentality is not itself entitled to instrumentality status' . . . and that 'only direct

ownership of a majority of shares by the foreign state satisfies the statutory requirement.'" *Id.* (quoting *Dole Food,* 538 U.S. at 473-74, 123 S.Ct. 1655).

The Second Circuit determined the KDIC was an organ of Korea by considering whether it was created and supervised by a foreign state and whether public employees were performing public functions. *Id.* at 217. Under its reasoning, it would appear the PIF is also an organ. It was created by royal decree, it is supervised by the Kingdom's Council of Ministers and staffed with government employees. *See* PIF Charter.

Yet, under the "legal characteristics" test, the PIF could qualify as a political subdivision. *See Hyatt,* 945 F.Supp. at 680. In *Hyatt,* a court in this district reasoned that a statutory requirement of an agency or instrumentality, as opposed to a political subdivision, is that it is a "separate legal person . . . that can function independent of the state." *Id.* at 684. If an entity could sue and be sued, own property, and contract in its own name, it would be considered an agency or instrumentality and not a political subdivision. *Id.* at 685. NCB submits the PIF sues and is sued as, and generally holds property on behalf of, the Ministry of Finance. Al-Wohaibi Aff. ¶¶ 9, 12.

NCB argues the Court should employ the "core functions" test outlined in *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148 (D.C.Cir.1994), to find that the PIF is the equivalent of the Kingdom. Under this test, if the entity's core functions are governmental, it is considered the state itself. *Id.* at 153. If its functions are commercial in nature, it is considered an instrumentality. *Id.* This Court is governed by Second Circuit precedent and finds *Filler* and *Hyatt* to be controlling. Even if it were to adopt *Transaero,* however, the Court finds on the record before it

that the PIF's emphasis on commercial projects precludes a finding that its core functions are governmental in nature. *See* PIF Charter ¶ 2 (noting the PIF's primary function of "financing . . . investments in productive projects of a commercial nature").

NCB also urges that *O'Connell Machinery Co. v. M.V. "Americana,"* 734 F.2d 115 (2d Cir.1984), mandates the finding that the PIF is a political subdivision of the Kingdom. In *O'Connell*, the Second Circuit reasoned that the legislative history of the FSIA indicated that "political subdivisions" were intended to include "all governmental units beneath the central government." *Id.* (quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in,* 1976 U.S.C.C.A.N. 6604, 6613). Given the PIF's position under the Ministry of Finance, *O'Connell* could lead to the conclusion that the PIF is a political subdivision of the Kingdom of Saudi Arabia. *Id.; but see In re Ski Train Fire,* 198 F.Supp.2d at 425 n. 9 (distinguishing *O'Connell* on grounds that the court based its holding on a finding that the Italian government double-tiered its administrative agencies); *Hyatt,* 945 F.Supp. at 683-84 (finding definition of "political subdivision" in *O'Connell* too broad and suggesting the case should be limited to its facts and not applied widely). In the twenty years since *O'Connell* was decided, however, courts have been inclined to limit the FSIA's grant of immunity. *See, e.g., Dole Food,* 538 U.S. at 473-74, 123 S.Ct. 1655; *Filler,* 378 F.3d at 218. Accordingly, the Court will not rely on *O'Connell* here.

b. Limited Jurisdictional Discovery is Warranted

The Court finds that resolution of the PIF's and thereby NCB's status is not determinable on the

current record and, therefore, limited jurisdictional discovery is warranted. As explained above, the PIF could qualify either as an organ or political subdivision of the Kingdom of Saudi Arabia. Additionally, the affidavits on which the parties ask the Court to rely have not been subjected to cross examination and are rather self-serving. The parties should have the opportunity to take discovery of the jurisdictionally relevant facts. *First City,* 150 F.3d at 177; *see also In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d 204, 208 (2d Cir.2003) (instructing district court to permit discovery before granting motion to dismiss based on fact-sensitive, multi-factor test). Accordingly, NCB's motion to dismiss for lack of subject matter jurisdiction based on the FSIA is denied without prejudice. Limited jurisdictional discovery will be permitted to explore PIF's function, organizational structure, and place within the Kingdom of Saudi Arabia.

D. Application of FSIA Exceptions to the Princes and Kingdom of Saudi Arabia

Three exceptions to foreign sovereign immunity are implicated in these motions—the commercial activities exception, 28 U.S.C. § 1605(a)(2), the state sponsor of terrorism exception, 28 U.S.C. § 1605(a)(7), and the torts exception, 28 U.S.C. § 1605(a)(5).

1. Commercial Activities Exception

Section 1605(a)(2) states:

> A foreign state shall not be immune . . . in any case . . . in which the action is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and

> that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The statute defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The Supreme Court has explained, "when a foreign government acts, not as a regulator of the market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 614, 112 S.Ct. 2160. Courts must inquire whether the foreign state's actions "are the type of actions by which a private party engages in trade and traffic or commerce." *Id.* (internal citations omitted).

Judge Robertson determined that the commercial activity exception did not apply to the *Burnett* Plaintiffs' claims against Prince Sultan and Prince Turki because "the act of contributing to a foundation is not within our ordinary understanding of 'trade and traffic or commerce' nor, apparently was it within the contemplation of . . . Congress." *Burnett II*, 292 F.Supp.2d at 18 (citing H.R.Rep. No. 94-1487, at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6615). Thus, the consolidated Plaintiffs do not assert that the commercial activities exception is applicable to any of the Defendants raising FSIA defenses here. This Court adopts Judge Robertson's reasoning. To the extent any Plaintiffs' claims are based on a Defendant's contributions to charities, those acts cannot be considered commercial.

The *Federal* Plaintiffs allege that the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki financed terrorism by contributing to or supporting charities known to support terrorist activities. In these Plaintiffs' view, this is essentially money laundering and, therefore, a commercial activity. *See, e.g.,* Federal Plaintiffs' Opp. to Motion to Dismiss of Prince Sultan at 18 (citing *U.S. v. Goodwin,* 141 F.3d 394, 399 (2d Cir.1997)). The Second Circuit noted in *Goodwin* that "[m]oney laundering is a quintessential economic activity,"141 F.3d at 399, but that statement has no bearing here. In *Goodwin* the court was not deciding whether money laundering is a commercial activity for purposes of the FSIA. *Id.* (analyzing constitutionality of criminal money laundering statute). The Second Circuit has made very clear that, for purposes of the FSIA, a commercial activity must be one in which a private person can engage lawfully. *Letelier v. Republic of Chile,* 748 F.2d 790, 797-98 (2d Cir.1984); *see also Saudi Arabia v. Nelson,* 507 U.S. 349, 360-62, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (holding detaining and torturing plaintiff is not commercial activity since it "is not the sort of action by which private parties can engage in commerce"). Since money laundering is an illegal activity, *see* 18 U.S.C. § 1956 (criminalizing money laundering), it cannot be the basis for applicability of the commercial activities exception. *See Letelier,* 748 F.2d at 798 (holding alleged participation in an assassination is not a lawful activity and therefore not a commercial activity for purposes of the FSIA). Accordingly, the Court finds that the commercial activities exception outlined in § 1605(a)(2) is inapplicable to the allegations contained in the *Federal* complaint against the Kingdom of Saudi Arabia, Prince Sultan, and Prince Turki.

2. State Sponsor of Terrorism

Subsection (a)(7) lifts immunity in cases:

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act . . . *except* that the court shall decline to hear a claim under this paragraph
>
> (A) if the foreign state was not designated as a state sponsor of terrorism . . . .

28 U.S.C. § 1605(a)(7) (emphasis added). The parties agree that the Kingdom of Saudi Arabia has not been designated a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7)(A) (explaining there is no jurisdiction if "the foreign state was not designated as a state sponsor of terrorism under . . . the Export Administration Act of 1979 . . . or . . . the Foreign Assistance Act of 1961"). Thus, this exception does not provide an exception to immunity for any of the Defendants raising the FSIA defense here.

3. Torts Exception

In relevant part, the torts exception deprives a foreign sovereign of immunity in actions:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this [exception] shall not apply to —

> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

28 U.S.C. § 1605(a)(5). Second Circuit law instructs that district courts must determine whether the defendant's alleged acts were tortious under the laws of New York and, if so, whether the defendant's acts were discretionary. *Robinson,* 269 F.3d at 142 ("If those activities could not render the Malaysian government liable for a tort under New York law, then it remained immune under § 1605(a)(5)."). In the event that the act is tortious and the acts were not discretionary, the alleged tortfeasor is subject to suit under the FSIA.

The FSIA's discretionary function exception replicates the discretionary function exception found in the Federal Tort Claims Act. *See* 28 U.S.C. § 2680(a). Courts have found both exceptions are "intended to preserve immunity for 'decisions grounded in social, economic, and political policy.'" *Marchisella v. Gov't of Japan*, No. 02 Civ. 10023(DC), 2004 WL 307248, at *2 (S.D.N.Y. Feb. 17, 2004) (citing *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (interpreting FTCA)). Generally, acts are discretionary if they are performed at the planning level of government, as opposed to the operational level. *Kline v. Kaneko*, 685 F.Supp. 386, 392 (S.D.N.Y.1988) (finding decision to expel plaintiff from Mexico was product of enforcement of immigration laws and therefore a discretionary function); *Marchisella*, 2004 WL 307248, at *2 (finding decision regarding placement of a water hose on a ship was an operational function and therefore

not discretionary and not protected by the FSIA); *Napolitano v. Tishman Constr. Corp.*, No. 96 Civ. 4402(SJ), 1998 WL 102789, at *4 (E.D.N.Y. Feb. 26, 1998) (finding purchasing consulate buildings and hiring contractor to renovate is a planning function and therefore discretionary).

Defendants argue that the Court should not even consider the torts exception for two reasons. First, they claim that for this exception to apply, the entire tort must have occurred in the United States, which Defendants argue is not the case here. Second, Defendants claim that Plaintiffs impermissibly seek to contort a § 1605(a)(7) state sponsor of terrorism claim into a § 1605(a)(5) tort claim.

With respect to Prince Sultan's and Prince Turki's arguments that the entire tort, meaning both the tortious conduct and the injury, must occur in the United States, Judge Robertson disagreed and stated the FSIA "preserves immunity for tort claims unless injury *or* death occurs in the United States." *Burnett II*, 292 F.Supp.2d at 19 n. 4 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C.Cir.1984)) (Edwards, J., concurring) (some emphasis omitted). Courts in the Second Circuit seem to take the opposite approach. "Although cast in terms that may be read to require that only the injury rather than the tortious acts occur in the United States, the Supreme Court has held that this exception 'covers only torts occurring within the territorial jurisdiction of the United States.'" *Cabiri v. Gov't of the Republic of Ghana*, 165 F.3d 193, 200 n. 3 (2d Cir.1999) (quoting *Amerada Hess*, 488 U.S. at 441, 109 S.Ct. 683); *see also Hirsh v. State of Israel*, 962 F.Supp. 377, 383-84 (S.D.N.Y.1997) (citing legislative history stating both the tort and injury must occur within the United

States for the exception to apply and dismissing complaint where plaintiffs failed to allege specific tort or place tort occurred); *Kline*, 685 F.Supp. at 391 (finding tort exception inapplicable where victim was abducted in Mexico City and brought to the United States because "the entire tort must be committed in the United States").

Plaintiffs allege that the Kingdom, Prince Sultan, and Prince Turki tortiously aided and abetted the September 11 terrorists by supporting charities that, in turn, supported al Qaeda and international terrorism. Plaintiffs also claim that, in return for protection of the Kingdom, these Defendants essentially willfully ignored the threat that Osama bin Laden and al Qaeda posed to the United States. Plaintiffs do not claim that the Kingdom or the Princes undertook any of their alleged acts in the United States. Yet, in the Plaintiffs' view, the operative torts for the Court's consideration are the attacks of September 11, which did take place in the United States. *See Burnett II*, 292 F.Supp.2d at 19 n. 4 (noting death and injuries occurred in United States). Further, Plaintiffs claim it would be unjust to allow foreign nations to escape liability for tortious acts performed in the United States if they could show that some act of planning the tort took place outside the United States.

Additionally, Defendants submit that, since the allegations are precisely those outlined in § 1605(a)(7)—that is, "personal injury or death that was caused by an act of . . . extrajudicial killing, aircraft sabotage . . . or the provision of material support or resources . . . for such an act"—none of the other exceptions should be read to apply in its place.[25] Defendants argue the

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[25] Judge Robertson recognized the same difficulty. Although he did consider Plaintiffs's claims under the tort exception, he

Court's adjudication of Plaintiffs' claims would interfere with the executive branch's discretion to designate state sponsors of terror. *See* 28 U.S.C. § 1605(a)(7)(A) (listing statutes that give Secretary of State authority to designate countries as sponsors of terrorism). Finally, Defendants submit the purpose of (a)(5) was "to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." *Amerada Hess,* 488 U.S. at 439-40, 109 S.Ct. 683; *Burnett II,* 292 F.Supp.2d at 19 (stating "the legislative history [of the FSIA] counsels that the exception should be narrowly construed so as not to encompass the farthest reaches of common law").

Plaintiffs respond that if Congress intended (a)(5) and (a)(7) to be mutually exclusive or intended that (a)(5) never apply in the terrorism context, Congress would have said so. Indeed, Congress did so very explicitly with respect to (a)(5) and (a)(2) and between (a)(7) and (a)(2). *See* § 1605(a)(5) (explaining excep-

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found that the language of the state sponsor of terrorism exception buttressed his ultimate conclusion that the tortious acts exception would not provide subject matter jurisdiction over Prince Sultan and Prince Turki. Unlike (a)(7), the tort exception "makes no mention of the 'provision of material support.'" *Burnett II,* 292 F.Supp.2d at 20 n. 5. After reviewing canons of statutory construction counseling that Congress acts intentionally when it includes particular language in one section of a statute but omits it from another, Judge Robertson concluded that Congress's omission of 'provision of material support' from (a)(5) should be treated as intentional. *Id.; see also HCSC-Laundry v. United States,* 450 U.S. 1, 6, 101 S.Ct. 836, 67 L.Ed.2d 1 (1980) (per curiam) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . , particularly when the two are interrelated and closely positioned.").

tion can only be used in situations "not otherwise encompassed in paragraph (2)"); § 1605(a)(7) (same). To further buttress their argument, Plaintiffs note the two exceptions have been interpreted to encompass different situations. Subsection (a)(7) covers acts of terrorism committed abroad by a state sponsor of terrorism, while subsection (a)(5) governs tortious acts, including terrorism, performed in the United States. *See Flatow v. Islamic Republic of Iran,* 999 F.Supp. 1, 15 (D.D.C.1998) (finding (a)(7) applied to conduct outside the United States and stating "28 U.S.C. § 1605(a)(5) already provides jurisdiction over state-sponsored terrorist acts in the United States, . . . the state sponsored terrorism exception would be redundant if it were held to apply only within the United States"). Again, Plaintiffs argue that Defendants' argument of exclusivity would lead to absurd results, such that if a foreign sovereign not designated a state sponsor of terror was involved in a car accident stemming from negligence it would not be immune; but if it undertook a deliberate act of violence it would enjoy immunity from suit.

The Court understands Plaintiffs' desire to find a legal remedy for the horrible wrongs committed on September 11, 2001. If appropriate, however, these Defendants are entitled to immunity from litigating these gravely serious claims in this forum. Congress made a policy decision that the Executive branch, and not the courts, have the authority to label a foreign nation a terrorist. *See* 28 U.S.C. § 1605(a)(7)(A). But when it drafted the state sponsor of terror exception it did not include mutually exclusive language that would preclude the application of the torts exception here. It did include such language with respect to the commercial activities exception. *See* 28 U.S.C. § 1605(a)(7) ("A foreign state shall not be im-

mune from jurisdiction of courts of the United States or of the States in any case—not otherwise covered by paragraph (2) above."); *see also* 28 U.S.C. § 1605(a)(5) ("A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case—not otherwise encompassed in paragraph (2) above."). Particularly in a case such as this where interests of sovereignty, comity, international relations, and separation of powers are implicated, the Court must be vigilant to exercise discipline to apply the law only as it is written. While there are certainly obstacles to (a)(5)'s application—and the Court is not convinced the Plaintiffs have or can overcome them—the Court will not rule as a matter of law that subsections (a)(7) and (a)(5) are mutually exclusive. Accordingly, the Court will consider Plaintiffs' evidence demonstrating the torts exception outlined in (a)(5) provides a basis for subject matter jurisdiction here.

To fit within the exception outlined in § 1605(a)(5), the Plaintiffs must come forward with evidence demonstrating the Princes' or Kingdom's tortious acts or omissions caused Plaintiffs' injuries.[26] 28 U.S.C. § 1605(a)(5); *Virtual Countries*, 300 F.3d at 241; *Cargill*, 991 F.2d at 1016. "Any terrorist act, in-

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[26] Plaintiffs argue that Judge Robertson held them to an unnecessarily stringent theory of causation and submit that the D.C. Circuit's subsequent decision in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C.Cir.2004), effectively overrules the holding in *Burnett II*. *See Kilburn*, 376 F.3d at 1129 (evaluating a claim under § 1605(a)(7) and holding the requirement for jurisdictional causation was proximate cause). This Court does not read *Burnett II* as requiring but-for causation and Defendants agreed at oral argument that the proper inquiry at this stage of the litigation is the presence of proximate causation. *See* Sept. 14, 2004 Tr. at 121.

cluding the September 11 attacks, might have been the natural and probable consequence of knowingly and intentionally providing financial support to al Qaeda, given [the complaints'] allegations that, prior to September 11, al Qaeda and Osama bin Laden had proclaimed their intentions to commit murderous terrorist activities against the United States and its citizens, . . . and had accompanied these words with actions by implementing, and publicly acknowledging responsibility for, such terrorist schemes as the 1993 bombing of the World Trade Center, the 1998 attack of the U.S. embassies in Kenya and Tanzania, and the 2000 attack of the U.S.S. Cole in Yemen." *Burnett I,* 274 F.Supp.2d at 105; *see also Ashton* Complaint ¶¶ 105-108 (1993 World Trade Center attack), 130-136 (embassy bombings), 152-55 (Cole attack); *Federal* Complaint ¶ 77 (alleging Osama Bin Laden established al Qaeda to wage war with the United States).

a. Prince Sultan and Prince Turki

Both Princes are alleged to have tortiously aided and abetted terrorism through their contributions to, and support of, Islamic charities that they knew or should have known were supporting terrorist organizations such as al Qaeda.[27] Additionally, Plaintiffs allege Prince Turki aided and abetted the terrorists by attempting to deflect their activities away from Saudi Arabia and by serving as a "facilita-

[27] To the extent that the consolidated Plaintiffs and the *Federal* Plaintiffs allege that Prince Sultan and Prince Turki made donations in their personal capacities, *see, e.g., Ashton* Complaint ¶ 269 (Prince Sultan); *Federal* Complaint ¶¶ 451-52 (Prince Turki), those claims are not subject to the FSIA's protection. The Court will determine whether it has personal jurisdiction over Prince Sultan and Prince Turki in Part II.

tor of Osama bin Laden's network of charities." *Ashton* Complaint ¶ 261; *Burnett* Complaint ¶ 350. Plaintiffs allege both Princes must have known that the United States would have been al Qaeda's target, making the attacks on September 11 a foreseeable result of the Princes' actions.

Pursuant to the Second Circuit's instruction, the Court must first determine whether the Princes' acts are tortious under New York law. *Robinson,* 269 F.3d at 142. In New York, conspiracy and aiding and abetting are varieties of concerted action liability. *Pittman v. Grayson,* 149 F.3d 111, 122 (2d Cir.1998). There must be "(1) an express or tacit agreement to 'participate in a common plan or design to commit a tortious act,' (2) tortious conduct by each defendant, and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that constitutes a tort.'" *Id.* (quoting *Rastelli v. Goodyear Tire & Rubber Co.,* 79 N.Y.2d 289, 295, 582 N.Y.S.2d 373, 591 N.E.2d 222 (1992)). Conspiracy "requires an agreement to commit a tortious act." *Id.* at 122-23 Aiding and abetting "requires that the defendant have given substantial assistance or encouragement to the primary wrongdoer." *Id.* at 123. "[U]nder either theory, the defendant must know the wrongful nature of the primary actor's conduct." *Id.* (finding no concerted action liability where airline had no knowledge mother was removing daughter from country without father's approval).

i. Causation

Judge Robertson found his consideration of Prince Sultan's and Prince Turki's FSIA defenses did not present an opportunity for a general discourse on causation since Plaintiffs' theory would stretch causation to "terra incognita." *Burnett II,* 292 F.Supp.2d

at 20. This Court agrees with Judge Robertson's conclusion, but it undertakes the causation analysis because a similar review will be necessary in its consideration of the Defendants' motions for failure to state a claim. *See* Part III below.

Plaintiffs place great reliance on *Halberstam v. Welch,* 705 F.2d 472 (D.C.Cir.1983) and *Boim v. Quranic Literacy Institute. & Holy Land Foundation for Relief & Development,* 291 F.3d 1000, 1023 (7th Cir.2002) ("*Boim II*"). Neither of these cases concern the tortious activity exception to the FSIA, but they do explain liability under the ATA and for aiding and abetting and conspiracy.[28] In *Halberstam,* the defendant was found liable as a joint venturer for a killing that occurred during a burglary at which she was not present. *Halberstam,* 705 F.2d at 488; *see also Lumbard v. Maglia, Inc.,* 621 F.Supp. 1529, 1536 (S.D.N.Y.1985) ("[T]hose who aid or abet or conspire in tortious conduct are jointly and severally liable with other participants in the tortious conduct, regardless of the degree of their participation or culpability in the overall scheme."). The court found that the defendant's intimate relationship with the bur-

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[28] The court in *Halberstam* outlined the elements of aiding and abetting as: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." *Halberstam,* 705 F.2d at 477. It described the elements of civil conspiracy as: "(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Id.*

glar and her assistance in his other illegal ventures "defie[d] credulity that [she] did not know that something illegal was afoot." *Halberstam,* 705 F.2d at 486.

In *Boim,* the district court had denied a motion to dismiss by U.S.-based charities alleged to have aided and abetted international terrorism. *Boim v. Quranic Literacy Inst. & Holy Land Found.,* 127 F.Supp.2d 1002, 1018 (N.D.Ill.2001) ("*Boim I*"). The Seventh Circuit affirmed the decision and held that the parents of a yeshiva student killed in 1996 in Israel by members of the military wing of Hamas could prove that the defendants aided and abetted their son's murder under the ATA if they could demonstrate that the charities "knew of Hamas' illegal activities, that they desired to help those activities succeed, and they engaged in some act of helping the illegal activities." *Boim II,* 291 F.3d at 1023. The court explained that "[f]oreseeability is the cornerstone of proximate cause, and in tort law, a defendant will be held liable only for those injuries that might have reasonably been anticipated as a natural consequence of the defendant's actions." *Id.* at 1012. Plaintiffs submit the court's decision in *Boim*—that the ATA was designed "to extend liability to all points along the causal chain of terrorism"—supports the finding that Prince Sultan's and Prince Turki's conduct caused the attacks on September 11, 2001. *Id.* at 1011.

Plaintiffs exert much effort outlining the connections between al Qaeda and the Defendant charities that Prince Sultan and Prince Turki supported. Plaintiffs argue that the indirect nature of the Princes' contributions to al Qaeda is not fatal to their claims since they allegedly knew that funds they donated to the Defendant charities were being diverted to al Qaeda. *See* Bierstein Aff. in Opp. to Prince Sul-

tan's Motion to Dismiss, Exs. 1-24. The Court has reviewed the exhibits on which Plaintiffs rely and finds only a handful relate to Plaintiffs' arguments.

Exhibit 11 is a report allegedly prepared for the President of the U.N. Security Council regarding a Saudi connection to terror financing. The report mentions Prince Sultan once in his role as the head of the Supreme Council of Islamic Affairs and does not conclude or suggest that he had any knowledge that charities to which he allegedly donated were funneling money to al Qaeda.

Exhibit 12 is a statement by the former French Minister of the Interior in which he claims to have met with Prince Sultan, Prince Turki, and other members of the Saudi Royal family in November 1994 and to have raised the "question of financial aid furnished by Saudi charitable organizations enjoying state support . . . to Islamist movements or terrorist groups." The only charity he names in his statement is the World Islamic League, not one of the charities to which the Princes allegedly donated.

Exhibits 21-24 are excerpts from *The Muslim World* regarding Prince Sultan's donations to IIRO and the Joint Saudi Committee for Relief of Kosovar Refugees ("JSCR"). There is no indication in these exhibits that IIRO or JSCR was funneling donations to al Qaeda. Even construing these allegations and exhibits in the light most favorable to Plaintiffs, and drawing all inferences in their favor, none of these exhibits amount to admissible evidence that Prince Sultan or Prince Turki knew the charities they supported were fronts for al Qaeda.

Alternatively, Plaintiffs argue that, since Osama bin Laden and al Qaeda made no effort to hide their

hatred for the United States, Prince Sultan and Prince Turki had to have been aware that the United States was a target, making the atrocities of September 11, 2001 a foreseeable result of their actions. *See, e.g.*, Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 2-10, 14, 15, 18, 20 (including reports and fatwas summarizing Osama bin Laden's and al Qaeda's repeated public threats to and denouncement of the United States). There is no question that in the years leading up to the September 11 attacks, Osama bin Laden and al Qaeda were increasingly vocal in their hatred of the United States and its interests. The question remains, however, whether Plaintiffs have adequately alleged that Prince Sultan's and Prince Turki's specific acts aided and abetted those terrorists.

Both Prince Sultan and Prince Turki claim Plaintiffs cannot demonstrate their alleged tortious activity caused Plaintiffs' injuries. They argue that Plaintiffs ignore that Osama bin Laden also targeted the Saudi Royal family. *See, e.g.*, Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Ex. 16 (Prince Turki, "Allied Against Terrorism," September 17, 2002, *Washington Post*, editorial in which Prince Turki explains the Saudis' practice of sharing information regarding Osama bin Laden and al Qaeda with the CIA and states that al Qaeda also targeted the Kingdom); Exs. 3, 5, 6 (fatwas issued by Osama bin Laden and Sheikh Omar Abdel Rahman targeting Americans and expressing extreme bitterness toward the Saudi Royal family). Prince Sultan argues that Plaintiffs blur the distinction between charities he is on record of supporting, IIRO and WAMY, and those he is not, Al Haramain and MWL. *See supra* note 20. Both Princes also distinguish the instant case from *Boim* and other cases cited by the Plaintiffs on the

basis that groups that they are alleged to have supported were not designated as terrorist organizations by the United States government. *See Boim II*, 291 F.3d at 1002 (noting Hamas was designated a terrorist organization by President Clinton in 1995 and by the Secretary of State in 1997); *see also* Consolidated Plaintiffs' Opp. to Prince Sultan's Motion to Dismiss at 16-17 (citing *Flatow*, 999 F.Supp. at 18 (holding Iran, a state sponsor of terrorism, liable as provider of material support to terrorist organization Palestine Islamic Jihad pursuant to 18 U.S.C. § 1605(a)(7)); *Smith v. Islamic Emirate of Afghanistan*, 262 F.Supp.2d 217, 232 (S.D.N.Y.2003) (granting default judgment against Iraq, a designated state sponsor of terror, after plaintiffs demonstrated it provided material support to Osama bin Laden and al Qaeda)); Consolidated Plaintiffs' Opp. to Prince Turki's Motion to Dismiss at 8 (same).

Although they did not involve New York law, the Court agrees that *Halberstam* and *Boim* are instructive. In *Halberstam*, the defendant enjoyed an extravagant lifestyle made entirely possible by her long-term live-in boyfriend's regular burglaries. The court concluded that she had to know of his criminal activities because she acted as a money launderer for her boyfriend's stolen metals business. *Halberstam*, 705 F.2d at 486-88. The court found the defendant was so close to the illegal activity that she had to be aware of her role in it. *Id.* at 486. In *Boim*, the court denied the defendants' motion to dismiss because the complaint contained specific factual allegations tying the defendants to Hamas. For example, one defendant entity allegedly employed an individual designated as a terrorist affiliated with Hamas, another entity admitted providing funds to Hamas, two individual defendants had documented and admitted ties

to Hamas, and numerous links existed between the individual terrorist defendants and the entity defendants. *Boim I,* 127 F.Supp.2d at 1006-1008. Unlike Hamas in *Boim,* none of the organizations the Princes are alleged to have supported in an official capacity were designated a sponsor of terrorism at the time of the alleged contributions. In fact, only BIF and certain branches of Al Haramain have since been designated. *See* Exec. Order No. 13224 (designating BIF (November 19, 2002) and branches of Al Haramain (Bosnia, Somalia on March 11, 2002; Indonesia, Kenya, Pakistan, Tanzania on January 22, 2004; Afghanistan, Albania, Bangladesh, Ethiopia, the Netherlands on June 2, 2004)). Thus, pursuant to *Boim,* the Plaintiffs would have to allege specific facts showing that the Princes knew or should have known that the charities they supported were actually fronts for al Qaeda. *See Burnett I,* 274 F.Supp.2d at 106.

Plaintiffs have pleaded al Qaeda's repeated, public targeting of the United States. They have not, however, pleaded facts to support an inference that the Princes were sufficiently close to the terrorists' illegal activities to satisfy *Halberstam* or New York law. Similarly, Plaintiffs have not pleaded facts to suggest the Princes knew they were making contributions to terrorist fronts and provided substantial assistance or encouragement to the terrorists to satisfy *Boim* or New York law. The Court has reviewed the complaints in their entirety and finds no allegations from which it can infer that the Princes knew the charities to which they donated were fronts for al Qaeda. The Court is not ruling as a matter of law that a defendant cannot be liable for contributions to organizations that are not themselves designated terrorists. But in such a case, there must be

some facts presented to support the allegation that the defendant knew the receiving organization to be a solicitor, collector, supporter, front or launderer for such an entity. There must be some facts to support an inference that the defendant knowingly provided assistance or encouragement to the wrongdoer. Here, there are no such factual bases presented, there are only conclusions. *See Robinson*, 269 F.3d at 146 ("[W]e note that the conclusory nature of [plaintiff's] allegations alone would give us pause before we would allow them to sustain jurisdiction.") (citing *Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir.2000) (finding, in context of FSIA 12(b)(1) motion, conclusory allegations in plaintiffs affidavit insufficient to sustain jurisdiction)). The law does not permit Plaintiffs

> to circumvent the jurisdictional hurdle of the FSIA by inserting vague and conclusory allegations of tortious conduct in their complaints—and then . . . rely on the federal courts to conclude that some conceivable non-discretionary tortious act falls within the purview of these generic allegations under the applicable substantive law. This is at odds with the goal of the FSIA to enable a foreign government to obtain an early dismissal when the substance of the claim against it does not support jurisdiction.

Robinson, 269 F.3d at 146.

ii. Discretionary Function

Plaintiffs argue that there is no discretion to conduct illegal activities and the so-called discretionary function exception to the tortious act exception should not apply to Prince Sultan or Prince Turki. *See, e.g., Liu v. Republic of China*, 892 F.2d 1419,

1421, 1431 (9th Cir.1989) (finding no discretion to violate Chinese law prohibiting murder where gunmen acting on direction of China's Director of Defense Intelligence Bureau killed plaintiff's husband); *Birnbaum v. United States,* 588 F.2d 319, 329-30 (2d Cir.1978) (finding in FTCA case that the CIA had no authority and therefore no discretion to open U.S. first class mail departing for and arriving from the Soviet Union); *Glickman v. United States,* 626 F.Supp. 171, 175 (S.D.N.Y.1985) (finding in FTCA case that CIA agent's secret administration of LSD to plaintiff was not discretionary function); *Letelier v. Republic of Chile,* 488 F.Supp. 665, 673 (D.D.C.1980) (holding no discretion to order or aid assassination of former Chilean ambassador and foreign minister) Prince Sultan insists that any recommendation of government grants to Islamic charities was a discretionary function. Prince Turki makes a similar argument regarding his actions as the head of DGI and urges the Court to find that all of his alleged actions should be subsumed by the discretionary function exception.

The Court finds the discretionary function exception independently bars Plaintiffs' claims against Prince Sultan and Prince Turki. Both Princes are accused of donating money or recommending government grants to charities that allegedly supported al Qaeda. As the head of DGI, Prince Turki is also alleged to have attempted to protect Saudi Arabia from terrorism and to have implemented the Kingdom's foreign relations with the Taliban and Osama bin Laden. In determining whether these were discretionary functions, the Court must decide whether the actions involved an element of choice or judgment based on considerations of public policy. *See Callahan v. United States,* 329 F.Supp.2d 404, 408

(S.D.N.Y.2004) (interpreting FTCA); *Berkovitz v. United States,* 486 U.S. 531, 536, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) (construing FTCA).

There can be little doubt that, as the chairman of the Supreme Council of Islamic Affairs, charged with making recommendations to the Council of Ministers regarding requests for aid from Islamic organizations located abroad, and as the head of the Special Committee of the Council of Ministers, charged with deciding which grants should be made to Islamic charities, Prince Sultan's decisions were made at the planning level of government, *Kline,* 685 F.Supp. at 392, and "grounded in social, economic, and political policy," *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755. Similarly, as the head of DGI, Prince Turki's decisions regarding the treatment of the Taliban and Osama bin Laden were judgments based on considerations of public policy. *See Callahan v. United States,* 329 F.Supp.2d at 408; *see also Burnett II,* 292 F.Supp.2d at 20-21 ("[T]his conclusion would be nearly self-evident: Prince Turki, as director of intelligence, taking acts to protect Saudi Arabia from terrorism, and Prince Sultan, as chairman of the Supreme Council, making recommendations to the Council of Ministers about requests for assistance from Islamic organizations outside Saudi Arabia or, as head of the Special Committee, deciding what disbursements should be made to Islamic charitable organizations, were clearly making 'decisions grounded in social, economic, and political policy.'") (quoting *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755).

Accordingly, to the extent that Plaintiffs allege acts Prince Sultan and Prince Turki performed in their official capacities, Prince Sultan's and Prince Turki's motions to dismiss the certain consolidated com-

plaints[29] and the *Federal* complaint are granted. The Court denies Plaintiffs' request for jurisdictional discovery because Plaintiffs have not presented any factual basis for believing that discovery might reasonably be expected to result in evidence that would overcome the discretionary function exception. *See* 28 U.S.C. § 1605(a)(5)(A) (exception not applicable to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.") The Court will consider the appropriateness of exercising personal jurisdiction over Prince Sultan's and Prince Turki's personal acts in Part II below.

b. Kingdom of Saudi Arabia

There is no dispute that the Kingdom of Saudi Arabia is a foreign state within the meaning of the FSIA. *Federal* Complaint ¶ 63. The *Federal* Plaintiffs have the "burden of going forward with evidence that, under exceptions to the FSIA, immunity should not be granted." *Virtual Countries*, 300 F.3d at 241 (internal quotations omitted). As explained above, the only possible applicable exception is the torts exception under 28 U.S.C. § 1605(a)(5).

The *Federal* Plaintiffs' allegations arise "predominantly from misconduct of ostensible charities under the Kingdom's control." Federal Opp. to Motion to Dismiss of the Kingdom of Saudi Arabia at 1.[30] Thus, the *Federal* Plaintiffs claim the Kingdom of

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[29] The consolidated complaints are *Ashton*, *Barrera*, *Burnett*, *Salvo*, and *Tremksy*.

[30] The *Federal* Plaintiffs allege that each of the following charities, which are all named as Defendants and represented by counsel in these actions, are agencies, instrumentalities, arms or organs of the Kingdom: MWL, IIRO, WAMY, Al Hara-

Saudi Arabia aided and abetted the terrorists through these charities. In attempting to overcome the presumption of the Kingdom's sovereign immunity, the *Federal* Plaintiffs argue the merits of their claims against the charities.[31] Based on news accounts that the Kingdom has dissolved its international charities and terrorist financing reports that implicate certain charities, the *Federal* Plaintiffs urge the Court to find that the Kingdom had previously willfully ignored the charities' support for terrorism. *See, e.g.*, Federal Opp. to Kingdom of Saudi Arabia Motion to Dismiss Ex. 2 ("Terrorist Financing, Report of an Independent Task Force Sponsored by the Council on Foreign Relations"), Ex. 3 (CNN.com June 2, 2004 "Saudis reform charities as antiterror measure" (mentioning only Al Haramain Islamic Foundation)), Ex. 5 (Senate Subcommittee Testimony, July 31, 2003 by Steven Emerson with Jona-

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main Islamic Foundation, Saudi High Commission for Relief to Bosnia and Herzegovina, SJRC, Rabita Trust, Saudi Red Crescent, and BIF. The Kingdom disputes the instrumentality status of MWL, IIRO, WAMY, Al Haramain Islamic Foundation, Rabita Trust, and BIF. These Plaintiffs request discovery as to the instrumentality status of these charities. The request is denied at this time and may be more appropriate when the Court considers each of the charities' motions to dismiss.

[31] Rather than pleading specific facts showing that the Kingdom caused Plaintiffs' injuries, the *Federal* Plaintiffs focus predominantly on the charities' actions. For example, these Plaintiffs argue that the Kingdom has waived the defense of sovereign immunity because certain charities, which have not been designated as instrumentalities of the Kingdom and which are represented by separate counsel, did not raise the FSIA defense in their motions to dismiss. The Court is not convinced by this argument because the waiver of FSIA immunity must be explicit. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 261 (2d Cir.2003).

than Levin, "Terrorism Financing: Origination, Organization, and Prevention: Saudi Arabia, Terrorist Financing and the War on Terror").

In response, the Kingdom argues that Plaintiffs ignore Osama bin Laden's public targeting of the Kingdom. *See, e.g.,* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Ex. 3 & 4; *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States,* 48, 373 (July 2004) (hereinafter "*9/11 Report*"). The Kingdom also submits it has worked with the United States to share information in the fight against terrorism. *9/11 Report,* at 115-22; Prince Turki Decl. ¶¶ 7, 8, 10. The U.S. State Department has not designated the Kingdom a state sponsor of terrorism. Additionally, the presidentially-appointed September 11 commission found no evidence of the Kingdom's funding or support for the September 11 terrorists. *9/11 Report,* at 171 ("[W]e have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization.").

The Court finds the Plaintiffs' allegations cannot overcome the discretionary function exception to the tortious acts exception. *Marchisella v. Gov't of Japan,* 2004 WL 307248, at *2 (explaining acts performed at the planning, as opposed to operational, level of government are protected by immunity); *Robinson,* 269 F.3d at 146 (noting conclusory nature of allegations would not sustain jurisdiction). Saudi Arabia's treatment of and decisions to support Islamic charities are purely planning level "decisions grounded in social, economic, and political policy." *Varig Airlines,* 467 U.S. at 814, 104 S.Ct. 2755; *see also Kline,* 685 F.Supp. at 392. The *Federal* Plaintiffs

have not met their burden of demonstrating an exception to the FSIA applies to negate the Kingdom's immunity. "[S]overeign immunity under the FSIA is immunity from suit, not just from liability." *Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (5th Cir.1994). Because there were no factual disputes raised in the Court's resolution of this motion, no jurisdictional discovery is necessary. *See Filetech S.A. v. France Telecom S.A.,* 304 F.3d 180, 183 (2d Cir.2002). The Kingdom of Saudi Arabia's motion to dismiss the *Federal* complaint for lack of subject matter jurisdiction is granted.

II. Personal Jurisdiction

To avoid dismissal for lack of personal jurisdiction under Rule 12(b)(2), Plaintiffs must establish personal jurisdiction over each Defendant. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 171 F.3d 779, 784 (2d Cir.1999). Because these motions are brought before discovery and decided without an evidentiary hearing, Plaintiffs need only make a prima facie showing that personal jurisdiction exists. *PDK Labs, Inc. v. Friedlander,* 103 F.3d 1105, 1108 (2d Cir.1997); *A.I. Trade Finance, Inc. v. Petra Bank,* 989 F.2d 76, 79 (2d Cir.1993). Plaintiffs may rely entirely on factual allegations, *Jazini v. Nissan Motor Co.,* 148 F.3d 181, 184 (2d Cir.1998), and they will prevail even if Defendants make contrary arguments, *A.I Trade,* 989 F.2d at 79. In resolving the motions, the Court will read the complaints and affidavits in a light most favorable to Plaintiffs. *PDK Labs,* 103 F.3d at 1108. It will not, however, accept legally conclusory assertions or draw "argumentative inferences." *Mende v. Milestone Tech., Inc.,* 269 F.Supp.2d 246, 251 (S.D.N.Y.2003)

(citing *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994)).

A. Bases for Personal Jurisdiction

1. New York Long-Arm Statute

"In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state's personal jurisdiction rules if the federal statute does not specifically provide for national service of process." *PDK Labs,* 103 F.3d at 1108. Similarly, a federal court sitting in diversity exercises personal jurisdiction over a foreign defendant to the same extent as courts of general jurisdiction of the state in which it sits pursuant to Federal Rule of Civil Procedure 4(k)(1)(A). *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez,* 305 F.3d 120, 124 (2d Cir.2002). In such cases, courts must determine if New York law would confer jurisdiction through its long-arm statute, and then decide if the exercise of such jurisdiction comports with the requisites of due process under the Fourteenth Amendment. *Id.* (citing *Bank Brussels,* 171 F.3d at 784); *Bensusan Rest. Corp. v. King,* 126 F.3d 25, 27 (2d Cir.1997).

a. Conspiracy Theory

Plaintiffs claim that New York's long-arm statute provides a basis for personal jurisdiction. Rule 302(a)(2) of New York's Civil Practice Law & Rules states in part: "(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . (2) commits a tortious act within the state . . . . " N.Y. C.P.L.R. § 302(a)(2) (McKinney 2002). Courts have defined "agent" to in-

clude a defendant's co-conspirators "under certain circumstances." *Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1266 (S.D.N.Y.1991) (citing *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F.Supp. 798, 806-07 (S.D.N.Y.1975), *aff'd*, 527 F.2d 87 (2d Cir.1975)). Thus, "acts committed in New York by the co-conspirator of an out-of-state defendant pursuant to a conspiracy may subject the out-of-state defendant to jurisdiction under C.P.L.R. 302(a)(2)." *Chrysler Capital Corp.* 778 F.Supp. at 1266.

Plaintiffs are not required to establish the existence of a "formal agency relationship" between the Defendants and their putative co-conspirators. *Daventree Ltd. v. Republic of Azerbaijan*, 349 F.Supp.2d 736, at 759, 2004 WL 2997881, at *18 (S.D.N.Y.2004). Yet, "the bland assertion of conspiracy . . . is insufficient to establish jurisdiction for the purposes of section 302(a)(2)." *Lehigh Valley Indus. Inc.*, 527 F.2d at 93-94; *Lamarr v. Klein*, 35 A.D.2d 248, 315 N.Y.S.2d 695, 697-98 (1st Dep't 1970) (holding that conclusory statements about defendant's role in conspiracy were insufficient to establish jurisdiction under the co-conspirator doctrine). To establish personal jurisdiction on a conspiracy theory, Plaintiffs must make a prima facie showing of conspiracy, allege specific facts warranting the inference that the defendant was a member of the conspiracy, and show that the defendant's co-conspirator committed a tort in New York. *Chrysler Capital Corp.*, 778 F.Supp. at 1266 (citing *Singer v. Bell*, 585 F.Supp. 300, 302 (S.D.N.Y.1984)).

"To plead a valid cause of action for conspiracy under New York law, a plaintiff must allege the primary tort and four elements: '(a) a corrupt agreement between two or more persons, (b) an overt act in fur-

therance of the agreement, (c) the parties' intentional participation in the furtherance of a plan or purpose, and (d) the resulting damage or injury.'" *Chrysler Capital Corp.* 778 F.Supp. at 1267 (quoting *Kashi v. Gratsos,* 790 F.2d 1050, 1055 (2d Cir.1986)). To warrant the inference that a defendant was a member of the conspiracy, Plaintiffs must show that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted 'at the direction or under the control' or 'at the request of or on behalf of' the out-of-state defendant." *Chrysler Capital Corp.,* 778 F.Supp. at 1268-69 (quoting *Dixon v. Mack,* 507 F.Supp. 345, 350 (S.D.N.Y.1980)).

"Whether an alleged conspiracy . . . existed is 'a mixed question of law and fact.'" *Daventree,* 349 F.Supp.2d 736, at 760, 2004 WL 2997881, at *19 (quoting *Mario Valente Collezioni Ltd. v. Confezioni Semeraro Paolo, S.R.L.,* 264 F.3d 32, 36 (2d Cir.2001)). Accordingly, the Court cannot accept "conclusory assertions on those issues; instead it must resolve such questions based upon an independent examination of the factual allegations while mindful of its duty to draw all factual inferences in plaintiffs' favor." *Id.* (rejecting conspiracy theory of personal jurisdiction without permitting jurisdictional discovery).

Plaintiffs claim that all Defendants in these actions conspired with the al Qaeda terrorists to perpetrate the attacks of September 11. *See, e.g., Ashton* Complaint ¶ 296; *Federal* Complaint ¶¶ 66, 72-74. Without supporting factual allegations, such a statement is insufficient to establish an agency relation-

ship. *Lehigh Valley Indus. Inc.*, 527 F.2d at 93-94; *Daventree*, 349 F.Supp.2d 736 at 762-63, 2004 WL 2997881, at *22 (citing *First Capital Asset Mgmt. v. Brickellbush, Inc.*, 218 F.Supp.2d 369, 395 (S.D.N.Y.2002)). As will be highlighted below, the complaints do not allege any specific facts from which the Court could infer that Prince Sultan, Prince Turki, Mohammed Abdullah Aljomaih, Sheikh Hamad Al-Husani, or Abdulrahman bin Mahfouz directed, controlled, or requested al Qaeda to undertake its terrorist activities. Nor are there any specific allegations of their knowledge of, or consent to those activities. *See Daventree*, 349 F.Supp.2d 736 at 762-63, 2004 WL 2997881, at *22 (finding no personal jurisdiction under a conspiracy theory because there was no basis from which the court could impute to defendants the conduct of their putative co-conspirators); *Chrysler Capital Corp.*, 778 F.Supp. at 1266 (requiring specific facts warranting the inference that the defendant was a member of the conspiracy). Accordingly, for Prince Sultan, Prince Turki, Mohammed Abdullah Aljomaih, Sheik Hamad Al-Husani, and Abdulrahman bin Mahfouz, personal jurisdiction cannot be based on a New York long-arm conspiracy theory. The Court will examine the possibility of exercising conspiracy theory personal jurisdiction over the remaining moving Defendants when it examines the specific claims against each of them below.

2. Federal Rule of Civil Procedure 4(k)

Under Federal Rule of Civil Procedure 4(k)(1)(D), service of process will establish personal jurisdiction over a defendant when so authorized by a federal statute.[32] Here, the ATA contains a nationwide ser-

[32] Although the Court does not have subject matter jurisdiction over any of the moving Defendants pursuant to the FSIA,

vice of process provision, such that proper service will confer personal jurisdiction.[33] 18 U.S.C. § 2334(a) (providing for nationwide service of process and venue); *Burnett I,* 274 F.Supp.2d at 95-96. Courts asked to analyze personal jurisdiction under the ATA's national service of process provision have concluded that a plaintiff "must demonstrate that the defendant has sufficient minimum contacts to satisfy a traditional due process analysis." *Estates of Ungar v. Palestinian Auth.,* 153 F.Supp.2d 76, 95 (D.R.I. 2001); *see also Biton v. Palestinian Interim Self-Gov't Auth.,* 310 F.Supp.2d 172, 179 (D.D.C.2004) (dismissing complaint pursuant to 18 U.S.C. § 2333 because individual defendants lacked contacts with the United States). "The relevant inquiry under such circumstances is whether the defendant has minimum contacts with the United States as a whole [to satisfy Fifth Amendment due process

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that statute also provides for personal jurisdiction if service is proper and subject matter jurisdiction has been established. 28 U.S.C. § 1330(b) ("[P]ersonal jurisdiction over a foreign defendant shall exist as to every claim for relief of which the district courts have jurisdiction . . . where service has been made under section 1608 of this title."); *Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F.Supp. 325, 329-330 (E.D.N.Y.1998).

[33] The *Federal* Plaintiffs pursue claims under RICO, which some courts outside the Second Circuit have held also provides for nationwide service of process and jurisdiction. *See* 18 U.S.C. § 1965; *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,* 119 F.3d 935, 942 (11th Cir.1997) (finding 18 U.S.C. § 1965(d) provides for nationwide jurisdiction); *cf. PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.,* 138 F.3d 65, 71 (2d Cir.1998) (finding "§ 1965 does not provide for nationwide personal jurisdiction over every defendant in every civil RICO case, no matter where the defendant is found"). The *Federal* Plaintiffs do not use their RICO claims as a basis for personal jurisdiction and the Court focuses on the ATA.

requirements], rather than . . . with the particular state in which the federal court sits." *Ungar,* 153 F.Supp.2d at 87. Many of the moving Defendants either dispute the manner in which they were served or were not served in the United States. Accordingly, the Court must consider an alternative basis for personal jurisdiction.

If the New York long-arm statute or the ATA does not establish personal jurisdiction, the Court will engage in a Rule 4(k)(2) analysis. Rule 4(k)(2) states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed.R.Civ.P. 4(k)(2). Rule 4(k)(2) "fill[s] a gap in the enforcement of federal law" for courts to exercise personal jurisdiction over defendants with sufficient contacts with the United States generally, but insufficient contacts with any one state in particular. Fed.R.Civ.P. 4(k)(2) advisory committee's note; *United States v. Int'l Bhd. of Teamsters,* 945 F.Supp. 609, 616-17 (S.D.N.Y.1996). For jurisdiction under Rule 4(k)(2), there must be a federal claim, personal jurisdiction must not exist over the defendant in New York or any other state, and the defendant must have sufficient contacts with the United States as a whole such that the exercise of jurisdiction does not violate Fifth Amendment due process. *Int'l Bhd. of Teamsters,* 945 F.Supp. at 617.

a. Purposefully Directed Activities Theory

Personal jurisdiction based on Rule 4(k) requires minimum contacts with the United States to satisfy Fifth Amendment due process requirements. Plaintiffs claim these requirements are met because Defendants purposefully directed their activities at the United States. *Burger King v. Rudzewicz,* 471 U.S. 462, 472, 479, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (explaining jurisdiction is appropriate if defendant "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities" and finding minimum contacts existed since dispute arose from a contract with substantial contacts with the forum) (internal quotations and citations omitted); *Calder v. Jones,* 465 U.S. 783, 789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (finding personal jurisdiction appropriate over non-resident defendants who "expressly aimed" intentionally tortious conduct at residents of forum state, even where defendants were never physically present in forum); *see also Daventree,* 349 F.Supp.2d 736 at 762-63, 2004 WL 2997881, at *22 (finding exercise of personal jurisdiction under Rule 4(k)(2) is appropriate if defendants "purposefully directed their activities at residents of the forum, and the litigation results from alleged injuries that arise out of or related to those activities"). Pursuant to the holdings in *Burger King, Calder*, and three recent terrorism cases—*Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F.Supp. 325 (E.D.N.Y.1998), *Daliberti v. Republic of Iraq,* 97 F.Supp.2d 38 (D.D.C.2000), and *Pugh v. Socialist People's Libyan Arab Jamahiriya,* 290 F.Supp.2d 54 (D.D.C.2003)—Plaintiffs submit that the moving Defendants knew that the primary target of Osama bin Laden's and al Qaeda's campaign of terror was the

United States and that by providing assistance to these terrorists, who Plaintiffs claim were Defendants' co-conspirators, Defendants aimed their conduct at the United States.

In *Rein,* the court denied defendants' motions to dismiss for lack of subject matter and personal jurisdiction in a case arising from the bombing of Pan Am Flight 103 over Lockerbie, Scotland. The court found it had subject matter jurisdiction over defendant Libya, a designated state sponsor of terror, pursuant to § 1605(a)(7) of the FSIA. *Rein,* 995 F.Supp. at 329-30. Noting that the FSIA provides for personal jurisdiction as long as subject matter jurisdiction exists and proper service was effected, the court turned to Libya's contacts with the United States. *Id.* at 330 (citing *Burger King,* 471 U.S. at 472, 105 S.Ct. 2174). It found that Libya's contacts with the United States were sufficient because its allegedly "intentional, tortious actions [were] . . . 'expressly aimed at' the United States," and included "destruction of a United States flag aircraft . . . while en route to the United States . . . with 189 United States nationals on board." *Id.* (citing *Calder,* 465 U.S. at 789, 104 S.Ct. 1482). The court concluded that its exercise of personal jurisdiction was appropriate since "[a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in the United States." *Id.*

Similarly, in *Daliberti* the court found it had subject matter jurisdiction over defendant Iraq, a designated state sponsor of terror, in a case stemming

from the alleged torture of several United States citizens who were working in Kuwait. *Daliberti,* 97 F.Supp.2d at 46. Iraq argued that exercising personal jurisdiction over it would offend constitutional due process since the FSIA "abrogates the minimum contacts requirement." *Id.* at 52. The court disagreed and explained that "Congress expressly addressed the minimum contacts requirement in enacting the FSIA by providing that '[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction.'" *Id.* (citing 28 U.S.C. § 1330(b); *Shapiro v. Republic of Bolivia,* 930 F.2d 1013, 1020 (2d Cir.1991)). The court acknowledged that the foreign state's contacts with the United States might be more attenuated in the context of the state sponsor of terrorism exception than in the FSIA's other exceptions, but concluded "in the context of this statute, the purpose for which it was enacted, and the nature of the activity toward which it is directed, . . . it is reasonable that foreign states be held accountable in the courts of the United States for terrorist actions perpetrated against U.S. citizens anywhere." *Id.* at 54. Finally, it noted that the "detention of these three plaintiffs had a direct effect in the United States and was consciously designed to affect United States policy . . . Iraq cannot now claim surprise at the assertion of jurisdiction by this Court." *Id.*

Most recently, in *Pugh,* representatives of passengers killed in the bombing of a French airliner in Africa survived a motion to dismiss by the individual defendants. The court found it had subject matter jurisdiction over seven Libyan officials, including Muammar Qadhafi, pursuant to the state sponsor of terrorism exception of the FSIA outlined in § 1605(a)(7). *Pugh,* 290 F.Supp.2d at 58. In its per-

sonal jurisdiction analysis, the court concluded that the individuals had sufficient contacts with the United States to satisfy due process since they had "conspired to sabotage" a flight, which was scheduled to "stop in several nations," thus making it foreseeable that "passengers of many nationalities would be on board." *Id.* at 59. From their actions, the defendants could have expected to be haled into "the courts of those nations whose citizens would die." *Id.* Given the number of passengers on the plane, it was also foreseeable that Americans would be on board. *Id.* Finally, the court reasoned that the "interest of the United States in preventing and punishing international terrorism has been a matter of worldwide common knowledge for years." *Id.* (citing statutes criminalizing terrorist acts). "It logically follows that if federal courts may constitutionally exercise criminal jurisdiction over such individuals, the Constitution should be no bar to those same federal courts, in a civil action . . . exercising civil *in personam* jurisdiction over those same individuals for the same acts." *Id.*

The courts in *Rein*, *Daliberti*, and *Pugh* properly exercised personal jurisdiction over each of the defendants in those cases pursuant to the FSIA, which specifically provides that personal jurisdiction exists where proper service and subject matter jurisdiction have been established. 28 U.S.C. § 1330(b); *Rein*, 995 F.Supp. at 329-30; *Daliberti*, 97 F.Supp.2d at 52; *Pugh*, 290 F.Supp.2d at 58. While the FSIA is not the basis for personal jurisdiction here, jurisdiction based on the ATA or Rule 4(k)(2) also requires minimum contacts with the United States. Accordingly, Plaintiffs may rely on their "purposefully directed" theory to establish these minimum contacts. But as existed in *Burger King*, *Calder*, and the three

terrorism cases, Plaintiffs must allege some personal or direct involvement by the Defendants in the conduct giving rise to their claims. *See, e.g., Daliberti,* 97 F.Supp.2d at 41 (explaining that defendant Iraq had held and tortured plaintiffs and that three of four plaintiffs were released only after U.S. officials' explicit negotiations with their Iraqi counterparts); *Pugh,* 290 F.Supp.2d at 56 (noting that seven individual Libyan defendants were sued in the United States after extensive official French investigation and that these defendants were deemed to be responsible for the bombings in both civil and criminal proceedings); *see also In re Magnetic Audiotape,* 334 F.3d at 208 (2d [sic] (stating a "court may exercise personal jurisdiction over defendant consistent with due process when defendant is primary participant in intentional wrongdoing—albeit extraterritorially—expressly directed at forum") (citing *Calder v. Jones,* 465 U.S. at 789-90, 104 S.Ct. 1482)); *Time, Inc. v. Simpson,* No. 02 Civ. 4917(MBM), 2003 WL 23018890, at *5 (S.D.N.Y. Dec. 22, 2003) (finding *Calder* turned on "personal involvement of the individual defendants in the particular conduct that gave rise to the plaintiff's claim" and granting motion to dismiss because plaintiff had not demonstrated that defendant had had any personal involvement in the events giving rise to the lawsuit). Accordingly, regardless of whether personal jurisdiction is based on the ATA's nationwide service of process provision or Rule 4(k)(2), to satisfy the Fifth Amendment's due process requirements, Plaintiffs must make a prima facie showing of each Defendant's personal or direct participation in the conduct giving rise to Plaintiffs' injuries.

3. Mass Torts Theory

In addition to the arguments articulated above, the *Federal* Plaintiffs submit that the Court should utilize a modified due process standard appropriate for mass torts. *See, e.g.,* Federal Prince Turki Opp. at 23; Federal Prince Mohammed Opp. at 12; SAAR Network Opp. at 12-13. Courts in the Eastern District of New York have outlined the modified standard in products liability cases as follows: the state's interests in the litigation replace contacts with the forum as the constitutional touchstone and the "reasonableness" inquiry is replaced with a hardship analysis. *Simon v. Philip Morris,* 86 F.Supp.2d 95, 129 (E.D.N.Y.2000); *In re DES Cases,* 789 F.Supp. 552, 587 (E.D.N.Y.1992). The Court declines to adopt this standard. There was no question that, at a minimum, the defendants in these products liability actions had substantial contacts with the forum, in these cases being New York, and were involved in the sale or production of the products at issue. *In re DES Cases,* 789 F.Supp. at 559; *Simon,* 86 F.Supp.2d at 99-100. Here, however, there are questions as to the Defendants' contacts with the forum, whether it be the United States generally or New York specifically, and the Defendants' alleged involvement with al Qaeda is much more attenuated.

B. Due Process Requirements

Any exercise of personal jurisdiction must comport with the requirements of due process. "The due process test for personal jurisdiction has two related components: the 'minimum contacts' inquiry and the 'reasonableness' inquiry." *Metro. Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 567 (2d Cir.1996). Depending on the basis for personal jurisdiction, due process under either the Fifth or Fourteenth

Amendment applies. "[T]he due process analysis is basically the same under both the Fifth and Fourteenth Amendments. The principal difference is that under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered." *Chew v. Dietrich,* 143 F.3d 24, 28 n. 4 (2d Cir.1998). Here, personal jurisdiction under the New York long-arm statute requires minimum contacts with New York pursuant to the Fourteenth Amendment. The exercise of personal jurisdiction under Rule 4(k) requires contacts with the United States as a whole pursuant to the Fifth Amendment.

1. Minimum Contacts

Minimum contacts are required so "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *see also World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). The minimum contacts requirement is also known as "fair warning," such that the defendant's contacts with the forum should be sufficient to make it reasonable to be haled into court there. *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174. The "'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at the residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* (internal citations omitted); *see also World-Wide Volkswagen,* 444 U.S. at 297-98, 100 S.Ct. 559 (finding purposefully directed activities where defendant delivered products into stream of commerce with expectation they would

be purchased by residents of forum); *Calder,* 465 U.S. at 789-90, 104 S.Ct. 1482 (finding publishing activities outside of forum were calculated to cause injury to plaintiff in forum where she lived and which also had the highest subscription rate). "Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174 (quoting *World-Wide Volkswagen,* 444 U.S. at 295, 100 S.Ct. 559). In every case, there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

For purposes of the minimum contacts inquiry, a distinction is made between specific and general jurisdiction. Specific jurisdiction exists when the forum exercises jurisdiction over the defendant in a suit arising out of the defendant's contacts with that forum. *Metro. Life Ins.* 84 F.3d at 567-68. General jurisdiction is based on the defendant's general business contacts with the forum; because the defendant's contacts are not related to the suit, a considerably higher level of contacts is generally required.[34] *Id.* at 568.

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[34] At oral argument, Plaintiffs focused on specific jurisdiction, *see* Oct. 12, 2004 Transcript at 44, but Plaintiffs include general jurisdiction arguments in many of their opposition briefs, *see, e.g.*, Ashton Opp. to Prince Mohamed at 22-24; Burnett Opp. to Aljomaih at 11. The Court considers all arguments.

2. Reasonableness

In determining whether the exercise of personal jurisdiction is reasonable, a court is to consider:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests in the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies.

Metro. Life, 84 F.3d at 568 (citing *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113-16, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)). "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King,* 471 U.S. at 477, 105 S.Ct. 2174.

There obviously are competing policy considerations at play here. In general, "'great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal Indus.,* 480 U.S. at 115, 107 S.Ct. 1026 (quoting *United States v. First Nat'l City Bank,* 379 U.S. 378, 404, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting)). "[T]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114, 107 S.Ct. 1026. On the other hand, "[t]here is some merit . . . to the plaintiffs' argument that no foreign terrorist today can fairly assert a lack of 'fair

warning' that it could be 'haled into court' in [this forum.]" *Biton v. Palestinian Interim Self-Government,* 310 F.Supp.2d 172, 178 (D.D.C.2004).

C. Jurisdictional Discovery

Plaintiffs urge the Court to deny Defendants' motions and order jurisdictional discovery. In evaluating jurisdictional motions, district courts enjoy broad discretion in deciding whether to order discovery. *See, e.g., APWU v. Potter,* 343 F.3d 619, 627 (2d Cir.2003) (noting a court may "devis[e] the procedures [to] ferret out the facts pertinent to jurisdiction"); *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir.1981) (noting a court has considerable procedural leeway in deciding whether discovery would assist resolution of motion to dismiss for lack of personal jurisdiction); *Lehigh Valley Indus. v. Birenbaum,* 527 F.2d 87, 93-94 (2d Cir.1975) (finding no abuse of discretion in denying discovery where the complaint failed to plead sufficient facts to establish jurisdiction). "If a plaintiff has identified a genuine issue of jurisdictional fact, jurisdictional discovery is appropriate even in the absence of a prima facie showing as to the existence of jurisdiction." *Daventree,* 349 F.Supp.2d 736 at 761, 2004 WL 2997881, at *20 (citing *In re Magnetic Audiotape,* 334 F.3d at 207-08). Courts are not obligated to subject a foreign defendant to discovery, however, where the allegations of jurisdictional facts, construed in plaintiffs' favor, fail to state a basis for the exercise of jurisdiction or where discovery would not uncover sufficient facts to sustain jurisdiction. *Id.* (citing *Jazini,* 148 F.3d at 183-85 (granting motion to dismiss and denying jurisdictional discovery where complaint was described as "sparse" and "conclusory")); *see also Cornell v. Assicurazioni Generali S.p.A., Consolidated,* Nos. 97

Civ. 2262, 98 Civ. 9186 (MBM), 2000 WL 284222, at *2 (S.D.N.Y. Mar. 16, 2000) (granting motion to dismiss and denying request for jurisdictional discovery where the complaint stated, without any supporting facts, that the defendant "participates in a 'multinational insurance arrangement' present in the State of New York"); *In re Ski Train Fire in Kaprun, Austria,* 230 F.Supp.2d at 410-413 (granting motion to dismiss and denying jurisdictional discovery where complaint only contained conclusory allegations).

D. Application of Plaintiffs' Theories to Moving Defendants

1. Prince Sultan

The Court outlined the allegations against Prince Sultan in Part I.B.1. With respect to Prince Sultan's contacts with the United States, Plaintiffs allege that "Saudi Royal family members own substantial assets in the United States of America, and do substantial business in the United States of America, the profits of which in part, are used to fund international terrorist acts, including those which led to the murderous attacks of September 11, 2001." *See Ashton* Complaint ¶ 296. There is no indication of whether these unspecified members of the Royal family include Prince Sultan. Most Plaintiffs also claim Prince Sultan is the ex-officio Chairman of the Board of Saudi Arabia Airlines, "which does business in the United States and internationally." *Burnett* Complaint ¶ 340; *Ashton* Complaint ¶ 253; *Barrera* Complaint ¶ 255; *Salvo* Complaint ¶ 245; *Tremsky* Complaint ¶ 180. The *Federal* Plaintiffs do not make a similar allegation.

To the extent these allegations are an attempt to establish general jurisdiction over Prince Sultan,

they are insufficient. *See In re Baan Co. Sec. Litig.*, 245 F.Supp.2d 117, 130 (D.D.C.2003) (refusing to hold that control status in foreign corporation with United States office is sufficient for personal jurisdiction over individual); *Cornell*, 2000 WL 284222, at *2 (granting motion to dismiss where complaint contained one conclusory statement regarding jurisdiction); *Family Internet, Inc. v. Cybernex, Inc.*, No. 98 Civ. 0637(RWS), 1999 WL 796177, at *4 (S.D.N.Y. Oct. 6, 1999) (holding that personal jurisdiction must be individually established over corporate officers even when the court has personal jurisdiction over the corporation itself).

Proceeding under the purposefully directed activities theory of personal jurisdiction, Plaintiffs argue that Prince Sultan knew or should have known the organizations to which he donated were funneling money to al Qaeda and that al Qaeda's primary target was the United States. Consol. Plaintiffs' Opp. at 23. Prince Sultan argues that his alleged actions cannot satisfy the minimum contacts requirement since the Second Circuit's recent description of *Calder* requires "primary participa[tion] in intentional wrongdoing." *See In re Magnetic Audiotape*, 334 F.3d at 208.

Judge Robertson dismissed without prejudice the claims against Prince Sultan in his personal capacity for lack of personal jurisdiction. *Burnett II*, 292 F.Supp.2d at 21-22. He rejected Plaintiffs' argument that Prince Sultan had purposefully directed his alleged activities at the United States. *Id.* at 22-23. Judge Robertson found that the complaint's claims that Prince Sultan donated money to foundations that allegedly funded al Qaeda "stop[ ] well short of alleging Prince Sultan's actions were 'expressly

aimed' or 'purposefully directed' at the United States." *Id.* at 23 (citing *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)). Judge Robertson also denied Plaintiffs' request for discovery because they did not provide an "outline of how their showing of minimum contacts might be enhanced by jurisdictional discovery." *Id.* at 22.

This Court's record, which Plaintiffs claim is more extensive than that before Judge Robertson, contains many examples of Osama bin Laden's and al Qaeda's public targeting of the United States. *See* Bierstein Aff. in Opp. to Prince Sultan's Motion to Dismiss, Exs. 1-24. The complaints also contain conclusory allegations that Prince Sultan aided and abetted terrorism. *See, e.g., Burnett* Complaint ¶ 363; *Federal* Complaint ¶¶ 429-31. But Plaintiffs do not offer any facts to lend support to their allegation that Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism. *See* Exec. Order 13244 (designating certain branches of Al Haramain in 2002 and later). "[L]egal conclusions done up as factual allegations are not facts and cannot substitute for facts." *Cornell*, 2000 WL 284222, at *2 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). Plaintiffs have note [sic] provided an "outline of how their showing of minimum contacts might be enhanced by jurisdictional discovery." *Burnett II*, 292 F.Supp.2d at 22. Accordingly, Prince Sultan's motions to dismiss the certain consolidated and *Federal* complaints for lack of personal jurisdiction over the claims concerning his personal acts are granted. Plaintiffs' request for jurisdictional discovery with respect to Prince Sultan is denied. *Daventree*, 349 F.Supp.2d 736, at 761, 2004

WL 2997881, at *20 (finding jurisdictional discovery is not necessary where the allegation of jurisdictional facts fails to state a basis for the exercise of personal jurisdiction).

2. Prince Turki

The allegations against Prince Turki are outlined in Part I.B.2. Because the consolidated Plaintiffs do not allege any acts taken by Prince Turki in his personal capacity, the Court only considers the *Federal* Plaintiffs' claim that Prince Turki made personal donations to certain Saudi charities. *See Federal* Complaint ¶ 452. The *Federal* complaint does not make any specific jurisdictional allegations against Prince Turki. Rather, these Plaintiffs rely on *Calder, Rein, Daliberti, Pugh*, and the modified due process standard for mass torts to argue that the September 11 attacks were a foreseeable result of Prince Turki's alleged support of certain Saudi charities. *See* Federal Opp. to Prince Turki's Motion to Dismiss at 22-23.

The *Federal* Plaintiffs have not presented any specific facts from which this Court could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda. Conclusory allegations that he donated money to charities, without specific factual allegations that he knew they were funneling money to terrorists, do not suffice. *See Burnett II*, 292 F.Supp.2d at 23 (citing *Burger King* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 774-75, 104 S.Ct. 1473); *see also* Exec. Order 13244 (designating certain branches of Al Haramain and BIF in 2002). Accordingly, Prince Turki's motion to dismiss the *Federal* complaint for lack of personal jurisdiction is granted. Jurisdictional discovery is not appropriate with respect to Prince Turki because

Plaintiffs have not identified any genuine issue of jurisdictional fact. *Daventree,* 349 F.Supp.2d 736, at 761, 2004 WL 2997881, at *20.

3. Prince Mohamed

The *Ashton* and *Federal* Plaintiffs allege that Prince Mohamed is or was the chairman or chief executive officer of three financial institutions in Saudi Arabia: Dar al Maal al Islami ("DMI"), Islamic Investment Company of the Gulf-Bahrain EC ("IICG"), and Faisal Islamic Bank-Sudan ("FIBS"), which are all shareholders of Defendant Al Shamal Islamic Bank.[35] *Ashton* Complaint ¶¶ 51, 54; *Federal* Complaint ¶¶ 307, 309, 473. They claim that Prince Mohamed knew or should have known that each of these financial institutions "acted as an aider and abettor and material sponsor of al Qaeda, Bin Laden, and international terrorism." *Ashton* Complaint ¶ 276; *Federal* Complaint ¶ 472 (alleging Prince Mohamed "has long provided material support and resources to al Qaeda"). The *Ashton* Plaintiffs claim that Prince Mohamed is "heavily involved in the sponsorship of terror through Faisal Islamic Bank-Sudan," since at some point al Qaeda allegedly had an account there. *Ashton* Complaint ¶¶ 65, 66, 255, 274; *see also* Ashton Opp. to Prince Mohamed's Motion to Dismiss at 25 (arguing that al Qaeda operative Jamal Ahmed Al Fadl used an account at Al Shamal Islamic Bank to transfer $250,000 for Osama bin Laden). These Plaintiffs also claim that Prince Mohamed has financial ties with alleged al Qaeda financier Muhammed

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[35] Osama bin Laden allegedly capitalized Al Shamal Islamic Bank with $50 million. *Burnett* Complaint ¶ 70. Several al Qaeda operatives, including Osama bin Laden, held accounts there. *Id.* ¶ 79.

Zouaydi. *Ashton* Complaint ¶ 258. The *Federal* Plaintiffs claim that Prince Mohamed made personal contributions to Saudi-based charities that he knew or should have known sponsored the terrorist activities of al Qaeda. These charities include IIRO, MWL, WAMY, BIF, the Saudi High Commission, SJRC, and Al Haramain. *Federal* Complaint ¶¶ 475-76

The *Ashton* complaint contains an unspecific allegation regarding the Saudi Royal family's ownership of property in the United States. *Ashton* Complaint ¶ 296. The *Ashton* Plaintiffs argue that general jurisdiction is appropriate because Prince Mohamed attended college and business school in the United States, gave two interviews in a New York apartment in 1978, gave a speech at Harvard in 1999, and made investments in American businesses through the banks he chairs in 2001. Ashton Opp. to Prince Mohamed Motion to Dismiss at 22-23. Plaintiffs assert jurisdictional discovery is likely to expose further contacts between Prince Mohamed and the United States.

If general jurisdiction is not established through Prince Mohamed's contacts with the United States, the *Ashton* and *Federal* Plaintiffs claim that jurisdiction exists under either the New York long-arm conspiracy theory or the purposefully directed activities theory. Ashton Opp. to Prince Mohamed Motion to Dismiss at 17-22; Federal Opp. to Prince Mohamed Motion to Dismiss at 6-12. Specifically, the *Ashton* Plaintiffs bolster their arguments for personal jurisdiction by citing to paragraphs in the complaint in support of each of the requirements for conspiracy. *See Chrysler Capital Corp.*, 778 F.Supp. at 1268-69 (outlining cause of action for conspiracy).

Plaintiffs claim that Prince Mohamed and al Qaeda agreed to injure the United States through acts of international terrorism. *Ashton* Complaint ¶¶ 5, 23 (all defendants are co-conspirators), 51, 105-08 (February 1993 World Trade Center bombing), 120 (February 1998 fatwa), 130-36 (1998 embassy bombings), 152-55 (U.S.S. Cole attack), 188, 255, 274-76, 580 (September 11, 2001 attacks); *see also Federal* Complaint ¶¶ 66, 72-74 (listing defendants who have "aided and abetted, conspired with, and provided material support and resources to, defendant al Qaeda and/or affiliated FTOs, associations, organizations or persons."). Next they claim the September 11 attacks were perpetrated in furtherance of that common scheme. *Ashton* Complaint ¶¶ 23, 188, 610. According to Plaintiffs, Prince Mohamed participated in the conspiracy by providing funding, financial support, and banking services through FIBS. *Id.* ¶¶ 48-54, 63-66, 255, 274-276, 387, 580, 582. Specifically, Plaintiffs claim:

> • On October 17, 1983, Prince Mohamed became CEO of DMI. Under Prince Mohamed's chairmanship, DMI developed banking, investment and insurance activities in approximately twenty offices across the world. DMI was founded in 1981 to foster the spread of Islamic banking across the Muslim world and its Board of Directors included Haydar Mohamed bin Laden, a half-brother of Osama bin Laden. *Id.* ¶ 274.
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> • Faisal Islamic Bank Sudan was one of the five main founders of Al Shamal Islamic Bank . . . . Al Shamal Islamic Bank is an instrumental bank in bin Laden's financial support network. Bin Laden used Al Shamal Bank for the funding of his al Qaeda network leading up to the 1998

United States embassy bombings in Africa. Defendant Faisal Islamic Bank was implicated during Al Fadl's May 2001 United States trial testimony regarding the bombings as holding and managing bank accounts for al Qaeda operatives. *Id.* ¶¶ 274-75.

- As the head of DMI, Prince Mohamed knew or should have known of these and other activities and acted as an aider and abettor and material sponsor of al Qaeda, bin Laden, and international terrorism. *Id.* ¶ 276.

- U.S. designated terrorists Wa'el Julaidan and Yassin Kadi had accounts in a DMI subsidiary. Ashton Opp. at 25.

Finally, Plaintiffs allege the that attacks in question caused many deaths, a fact that no one disputes. *Ashton* Complaint ¶¶ 23, 610.

In response, Prince Mohamed argues that Plaintiffs have failed to demonstrate that he is "present" in the United States for general personal jurisdiction purposes. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 411-12, 416-18, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 998 (2d Cir.1975) (buying and selling American securities is insufficient to establish that defendant was "doing business" in the United States). Prince Mohamed submits that some of the contacts on which Plaintiffs rely are too far removed in time from September 2001 to be considered by the Court. *See Metro. Life*, 84 F.3d at 569 (holding courts should examine a defendant's contacts with the forum for a reasonable period prior to the date on which the lawsuit was filed, and finding that six years was reasonable). Prince Mohamed cor-

rectly submits that his position as an officer of DMI, IICG, and FIBS would not be a basis for jurisdiction over him even if the Court had personal jurisdiction over these entities. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."). Finally, Prince Mohamed argues that the conclusory allegation that he participated in a terrorist conspiracy, without specific facts, is insufficient to create personal jurisdiction over him.

The Court agrees that Plaintiffs have not presented a prima facie case of general jurisdiction over Prince Mohamed. In the ten years before the attacks, Prince Mohamed's contacts with the United States consist of one speech and a handful of investments in the United States through the banks with which he is affiliated. These contacts are not sufficiently "systematic and continuous" to maintain general jurisdiction over a defendant in this action.[36] *See Helicopteros,* 466 U.S. at 416, 104 S.Ct. 1868 (holding that purchasing in forum, sending personnel for training in forum, and negotiating a contract in forum were not sufficient to establish general jurisdiction).

Plaintiffs have alleged that DMI and FIBS might have been involved in the financing of terrorism. *See, e.g., Ashton* Complaint ¶¶ 274-75; Ashton Opp. at 25. Even assuming that the Court has personal jurisdiction over these entities, "[t]he mere fact that a corporation is subject to jurisdiction . . . does not mean that individual officer may be hauled before

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[36] There is no allegation that Prince Mohamed's investments in the United States are related to any alleged conspiracy or to al Qaeda's activities.

New York courts without any showing that the individuals themselves maintained a presence or conducted business in New York." *Family Internet,* 1999 WL 796177, at *4. Plaintiffs have not alleged that Prince Mohamed had any knowledge or involvement in any al Qaeda accounts at any of the banks he chaired. FIBS' relationship with Al Shamal Islamic Bank, which purportedly knowingly opened accounts for al Qaeda operatives, including Osama bin Laden, is too remote in time and proximity to implicate Prince Mohamed. To make a prima facie case of personal jurisdiction, Plaintiffs must either allege personal acts by Prince Mohamed by which he purposefully directed his activities at the United States by supporting Osama bin Laden, al Qaeda, or their terrorist agenda, or demonstrate that the acts of the banks he chaired can be imputed to him. Plaintiffs have not met their burden. Thus, Prince Mohamed's motions to dismiss the *Ashton* and *Federal* complaints as against him for lack of personal jurisdiction are granted.

4. Estate of Mohammad Abdullah Aljomaih

On May 2, 2003 by Second Addition and Removal of Defendants Pursuant to Case Management Order No. 1 imposed by Judge Robertson, the *Burnett* Plaintiffs added a defendant "Mohammed Bin Abdullah Al-Jomaith." To date, no specific allegations have been added to the complaint with respect to Mr. Aljomaih.

In anticipation of what the claims against him might be, before his death Mr. Aljomaih prepared a declaration in support of his motion to dismiss. He was born in Saudi Arabia in 1915 and lived in Riyadh for most of his life. Aljomaih Decl. ¶ 3. He and his

family began a company in the 1940s that now supplies automobiles, soft drinks, construction equipment, and other goods and services to large portions of Saudi Arabia. *Id.* ¶ 4. In the past ten years he visited the United States three times for medical reasons. *Id.* ¶¶ 5-6. Prior to these medical visits, he took a short trip to New York City in 1964. *Id.* ¶ 7. He owned no property, held no bank accounts, and conducted no business in this country. *Id.* ¶ 10.

Mr. Aljomaih's estate argues that there were problems with his service. He was served pursuant to Judge Robertson's March 25, 2003 approving service by publication. Under that order, Plaintiffs published a list of defendants in two publications, *The International Herald Tribune* and *Al Quds Al Arabia*. The notice in *The International Herald Tribune* contained Mr. Aljomaih's name in English, a language he could not read. *Id.* ¶ 11. *Al Quds Al Arabi* is published in Arabic, but is not circulated in Saudi Arabia and the list did not include Mr. Aljomaih's name. Even if service was proper, however, the estate of Mr. Aljomaih claims the Court does not have personal jurisdiction over it.

Plaintiffs submit that Mr. Aljomaih is implicated by the "Golden Chain." Plaintiffs' Opp. at 9. The "Golden Chain" is a group of documents that was discovered by Bosnian authorities searching the offices of charity Defendant BIF in March 2002. Plaintiffs claim the "Golden Chain" contains a list of early direct donors to al Qaeda. Plaintiffs' Opp. at 9; *see also* Bierstein Aff. in Opp. to Al-Husani Motion to Dismiss, Ex. 2 ("Golden Chain" document). It includes the entry "Al-Jumaih. Jeddah (S.A.)." Plaintiffs do not dispute that "for more than sixty years [Mr. Aljomaih] lived in Rihadh," not Jeddah, Aljomaih Decl.

¶ 3, yet they insist the document identifies him as a direct donor to al Qaeda. Additionally, Plaintiffs claim that Mr. Aljomaih's company donated money to charity Defendant IIRO. Plaintiffs assert there are sufficient allegations against Mr. Aljomaih in the form of general allegations against all Defendants to put him on notice of the claims against him. They claim that jurisdiction over Mr. Aljomaih's estate is proper because he "purposefully directed" his activities at the United States by supporting al Qaeda. Plaintiffs also submit that Mr. Aljomaih's company does business with General Motors and Shell Corporation and that, therefore, he must have had contacts with the United States. *See* Opp. at 11; Statement of Jamie L. Paye attached to Plaintiffs' Opp.

The Court finds the Plaintiffs have not established a prima facie case of jurisdiction over Mr. Aljomaih to defeat his motion or warrant jurisdictional discovery. Their theory of jurisdiction rests almost entirely on a document with serious foundational flaws. Even assuming, as the Court must, that the "Golden Chain" refers to Mr. Aljomaih, with no indication of who wrote the list, when it was written, or for what purpose, the Court cannot make the logical leap that the document is a list of early al Qaeda supporters. Mr. Aljomaih's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is accordingly granted.

5. Sheikh Hamad Al-Husani

The posture of the *Burnett* Plaintiffs' case against Sheikh Hamad Al-Husani is similar to that against Mr. Aljomaih. Mr. Al-Husani was also added to a list of defendants to be served by publication and the complaint contains no specific allegations against him. Al-Husani Decl. ¶ 10. He is a watch retailer re-

siding in Saudi Arabia. *Id.* ¶¶ 3-4, 7. Mr. Al-Husani has never visited the United States, owns no real property here, holds no bank accounts or investments in the United States, and does not engage in transactions with any businesses in the United States. *Id.* ¶¶ 3, 5-7. He has never supported any person or organization that he has known to participate in any terrorist attacks. *Id.* ¶ 9. Mr. Al-Husani submits that Plaintiffs cannot cure the lack of allegations in the complaint in its motion papers. *Wright v. Ernst & Young, LLP,* 152 F.3d 169, 178 (2d Cir.1998) (explaining a party is not permitted to amend its complaint through allegations made in motion papers).

Mr. Al-Husani also claims that he was not properly served because *The International Herald Tribune* has a circulation of only 199 in Saudi Arabia and is published in English, and *Al Quds Al Arabia* is a London-based paper banned in the Kingdom. Even if service was proper, however, Mr. Al-Husani submits this Court does not have personal jurisdiction over him.

The *Burnett* Plaintiffs claim that Mr. Al-Husani is also implicated by the "Golden Chain," and thus an early supporter of al Qaeda. Plaintiffs' Opp. to Al-Husani Motion to Dismiss at 10; Bierstein Aff. at Ex. 2 (document listing "Hamad Al Husaini," without indicating when list was written, by whom, or for what purpose). The Plaintiffs place great weight on the United States' inclusion of the "Golden Chain" in its proffer of evidence in *United States v. Arnaout,* the government's case against an executive of Defendant charity BIF. *See* Bierstein Aff. at Ex. 1 (proffer). The court presiding over that case, however, ruled that the document was inadmissible hearsay. *United States v. Arnaout,* No. 02 Cr. 892, 2003 WL 255226, at *1-2 (N.D.Ill. Feb. 4, 2003). Nevertheless, by sup-

porting al Qaeda, Plaintiffs assert Mr. Al-Husani purposefully directed his activities toward the United States, making the exercise of personal jurisdiction appropriate. *See, e.g.* Bierstein Aff. Exs. 9-15 (detailing al Qaeda's hatred for and actions against the United States). Additionally, Plaintiffs claim that one of Mr. Al-Husani's companies is a supporter of Al-Waqf al-Islami Foundation, a Dutch entity whose seminars "have drilled extremist messages into the heads of thousands of young Muslims." "Radical Foundation: In 'Law' Seminars, A Saudi Group Spreads Extremism," *Wall St. J.*, Apr. 15, 2003, at Bierstein Aff. Ex. 6.

Plaintiffs have not established a prima facie showing of jurisdiction over Mr. Al-Husani to survive his motion to dismiss or warrant jurisdictional discovery. The "Golden Chain" does not say what the Plaintiffs argue it says. It is only a list of names found in a charity's office. It does not establish Mr. Aljomaih's involvement in a terrorist conspiracy culminating in the September 11 attacks and it does not demonstrate that he purposefully directed his activities at the United States. Accordingly, Mr. Al-Husani's motion to dismiss the *Burnett* complaint against him is granted.

6. NCB

The Court outlined the *Ashton* and *Burnett* Plaintiffs' claims against NCB in Part I.B.4. For purposes of the personal jurisdiction analysis, the Court will assume at this point that the FSIA does not provide for subject matter and personal jurisdiction over NCB. Accordingly, the Plaintiffs will have to make a prima facie showing to survive NCB's motion to dismiss. In that vein, Plaintiffs argue that NCB purposefully directed its activities at the United States

and participated in a conspiracy that culminated in the attacks of September 11.

Plaintiffs submit NCB has many contacts with the United States, including a wholly-owned subsidiary in New York City through which it operates an international banking business. *See, e.g.*, Aff. of John Fawcett in Support of Ashton Plaintiffs' Opp. to NCB's Motion to Dismiss (hereinafter "Fawcett Aff.") ¶ 3, Exs. 2 & 3. NCB has been a party to lawsuits in the Southern District of New York, both as a plaintiff and defendant. Fawcett Aff. ¶ 7. *The Muslim World League Journal,* a monthly publication distributed in American mosques, ran solicitations from 1998 to 2001 for the Islamic Solidarity Fund & Waqf for the Organization of the Islamic Conference and the Khair Funds of the Muslim World League that provided NCB account numbers to which donors could contribute directly. *Id.* ¶ 8, Ex. 5. Plaintiffs request jurisdictional discovery to explore further contacts.

NCB argues that none of Plaintiffs' submissions satisfy the constitutionally required showing of minimum contacts. NCB closed its New York City branch office in 1992. Decl. of Jorge Juco ("Juco Decl.") ¶ 5, at Berger Aff. in Support of NCB's Motion to Dismiss *Ashton* and *Burnett,* Ex. 5. NCB's second-tier subsidiary, SNCB Securities Inc., dissolved in February 2001. *Id.* (citing Ex. A of Juco Decl., the certified copy of the Certificate of Dissolution); *see also Schenker v. Assicurazioni Generali, S.P.A.*, No. 98 Civ. 9186(MBM), 2002 WL 1560788, at *4 (S.D.N.Y. July 15, 2002) (finding no personal jurisdiction over parent corporation where New York subsidiary was sold two months prior to commencement of action). NCB submits its involvement in lawsuits is equally unavailing because both were terminated

prior to the filing of this action. *See* docket *Logan Feed v. Nat'l Commercial Bank,* No. 92 Civ. (S.D.N.Y.) (NCB terminated July 24, 1995); docket *Nat'l Commercial Bank v. Morgan Stanley Asset Mgmt., Inc.,* No. 94 Civ. 3167 (S.D.N.Y.) (closed Feb. 17, 1998). It contends that its consent to personal jurisdiction in one case does not open the door to personal jurisdiction in future cases. *See Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 50 n. 5 (2d Cir.1991); *Andros Compania Maritima, S.A. v. Intertanker Ltd.,* 714 F.Supp. 669, 675 (S.D.N.Y.1989) (holding lawsuits in the forum do not establish general personal jurisdiction). NCB argues that there is no indication it placed the advertisements in *The Muslim World League Journal,* or that any donations were deposited into NCB accounts.

In arguing its absence of contacts with the United States, NCB reiterates that it is not domiciled, organized, or maintaining an office in New York. Juco Decl. ¶ 3. It is not registered or licensed to do business in the United States and has no property in the United States. *Id.* ¶ 8. Shares of NCB stock are not sold in the United States, there are no NCB employees or telephone numbers in the United States, and the company does not advertise or solicit business in the United States. *Id.* ¶ 11. Its website is accessible from United States, but only NCB account holders may access the inter-active services. *Id.* The Saudi Arabian Monetary Agency requires that NCB's account holders be Saudi citizens or residents, Saudi government entities, or business or charity entities with lawful status in Saudi Arabia. Juco Decl. ¶ 10.

NCB claims the rare contacts it does have with the United States do not satisfy the requirements of due process. Although it maintains correspondent bank-

ing relationships with U.S. commercial banks, Juco Decl. ¶ 12, NCB argues such relationships are insufficient to establish personal jurisdiction over NCB. *Semi Conductor Materials, Inc. v. Citibank Int'l PLC,* 969 F.Supp. 243, 244 (S.D.N.Y.1997) (holding foreign bank's correspondent banking relationship with New York bank is not sufficient for personal jurisdiction); *Casio Computer Co. v. Sayo,* No. 98 Civ. 3772(WK), 2000 WL 1877516, at *26 (S.D.N.Y. Oct. 13, 2000) (holding defendant bank's wire transfers to U.S. bank accounts does not create minimum contacts); *Leema Enters., Inc. v. Willi,* 575 F.Supp. 1533, 1537 (S.D.N.Y.1983) (holding correspondent banking relationships insufficient to create general personal jurisdiction). NCB offers its customers the opportunity to open accounts directly with United States-based securities broker-dealers, but NCB does not act as a broker-dealer for securities sold in the United States and is not so licensed. Juco Decl. ¶ 14; *Bersch v. Drexel Firestone, Inc.,* 519 F.2d 974, 998 (2d Cir.1975) (finding Canadian securities broker not "doing business" in New York when it arranges for its Canadian customers to buy and sell U.S. securities through U.S. broker). In 2002, less than 2% of the securities NCB traded for its own account were issued by U.S. entities. Juco Decl. ¶ 15; *Schenker,* 2002 WL 1560788, at *3-5 (finding that a single bank account in the United States, constituting small fraction of defendant's total assets, is insufficient to form the basis for personal jurisdiction).

Taken individually, NCB's contacts with the United States would not satisfy due process requirements. However, when they are examined as a whole—the presence of a branch office until 1992, a subsidiary until 2001, taking advantage of the privilege of its presence in New York by instigating a

lawsuit in this forum, advertisements in U.S. publications—the Court finds that they may, with the help of limited jurisdictional discovery, comport with due process. NCB's motion to dismiss is therefore denied without prejudice.

7. Abdulrahman bin Mahfouz

Abdulrahman bin Mahfouz is a Defendant in the *Burnett* action. He is the son of Defendant Khalid bin Mahfouz and a director of the Defendant charity Blessed Relief Society, also known as Muwaffaq. *Burnett* Complaint ¶¶ 331; 445. Blessed Relief is a branch of the Human Concern International Society, which Osama bin Laden identified as a supporter in 1995. *Id.* ¶ 333. He is a shareholder and the CEO of former Defendant Nimir, LLC, also known as Nimir Petroleum Ltd. *Id.* ¶ 443.[37] Finally, Plaintiffs claim that Mr. Bin Mahfouz was a member of the board and Vice Chairman of the Executive Management Committee of Defendant National Commercial Bank. *Id.* ¶ 445.

Plaintiffs base their personal jurisdiction arguments on their claim that Mr. bin Mahfouz was a participant in the conspiracy of terror that purposefully directed its conduct at the United States and included the September 11 hijackers. Plaintiffs also claim that he has business interests in the United States. Specifically he is a shareholder in U.S.-based companies, and his company, Al Murjan, allegedly has dealings with the American phone company Hughes Technologies, Inc.

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[37] The *Burnett* Plaintiffs voluntarily dismissed their claims against Nimir LLC. *See* Mem. in Supp. of Motion to Dismiss Ex. 1.

Mr. bin Mahfouz disputes the manner in which he was served. His name appeared in Plaintiffs' notice by publication in *The International Herald,* which only has circulation of 199 in the entire Kingdom of Saudi Arabia, and *Al Quds al-Arabia,* which is banned in the Kingdom. He submits that he has no personal contacts with the United States and there is no basis for exercising personal jurisdiction over him.

The *Burnett* complaint does not contain any specific actions by Mr. bin Mahfouz from which the Court could infer that he purposefully directed his activities at the United States. His affiliations with entities that are alleged to have U.S. contacts will not sustain jurisdiction. *Family Internet,* 1999 WL 796177, at *4. Finally, being a shareholder in a United States company is not sufficient to establish general personal jurisdiction over Mr. bin Mahfouz. *Bersch,* 519 F.2d at 998; *see also Schenker,* 2002 WL 1560788, at *3-5 (finding single bank account in United States constituting small fraction of defendant's total assets is not a sufficient basis for personal jurisdiction). Mr. bin Mahfouz's motion to dismiss the *Burnett* complaint as against him for lack of personal jurisdiction is accordingly granted.

8. Saudi Binladin Group, Tariq Binladin, Omar Binladin, and Bakr Binladin

The *Ashton* and *Burnett* complaints name the Saudi Binladin Group ("SBG") as a Defendant. The *Burnett* complaint also names Tariq Binladin, Omar Binladin, and Bakr Binladin, Osama's half-brothers, as Defendants. In both actions, these Defendants move to dismiss the complaint or for a more definite statement.

Based in Jeddah, Saudi Arabia, SBG is the successor to a construction company founded by Mohammed

Binladin, the father of Osama bin Laden. *Ashton* Complaint ¶ 543; *Burnett* Complaint ¶ 311. It is now one of the largest engineering and construction companies in the Arab world and is managed by Osama bin Laden's half brothers, including defendants Bakr Binladin, who runs SBG, and Tariq Binladin, who holds a position on the board. *Ashton* Complaint ¶ 545; *Burnett* Complaint ¶ 313. Tariq Binladin allegedly had a prominent role at IIRO in 1990. *Ashton* Complaint ¶ 557; *Burnett* Complaint ¶ 326. Osama bin Laden purportedly used SBG to build an infrastructure in Afghanistan. *Ashton* Complaint ¶¶ 546, 547; *Burnett* Complaint ¶¶ 314-316. After the Soviets withdrew from Afghanistan in 1989, Osama bin Laden returned to work with SBG in Jeddah. *Ashton* Complaint ¶ 548; *Burnett* Complaint ¶ 317. SBG allegedly continued to support Osama bin Laden after he relocated to Sudan in 1991. *Ashton* Complaint ¶ 548; *Burnett* Complaint ¶ 317. For example, SBG, through two subsidiaries allegedly supported Osama bin Laden's participation in the construction of the Tahaddi road and Port Sudan Airport. *Ashton* Complaint ¶¶ 550; 552, 553; *Burnett* Complaint ¶¶ 319-322. Plaintiffs claim Osama bin Laden's name is still listed on SBG corporate records. *Ashton* Complaint ¶ 558; *Burnett* Complaint ¶ 329. Defendants dispute this and argue he was formally removed from SBG's ownership documents in June 1993. SBG's Mem. in Supp. of Motion to Dismiss Ashton Complaint at 2. Plaintiffs also claim that Osama bin Laden never "broke" with his family after he was exiled to Sudan and that SBG continued to provide him financial assistance and engineering support. *Ashton* Complaint ¶ 549; *Burnett* Complaint ¶ 318. Defendants also dispute this statement and argue that Bakr formally ostracized Osama from the family and the company in a

February 1994 statement. SBG's Mem. in Supp. of Motion to Dismiss Ashton Complaint at 2.

SBG "sheltered and directly supported operatives of the al Qaeda terrorist organization." *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. Mohammad Jamal Khalifa, allegedly a key al Qaeda operative, was taken in by a branch of SBG, the Mohammed Bin Laden Organization. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. The Mohammed Bin Laden Organization is allegedly a wholly-owned subsidiary of SBG and its board members include defendants Bakr, Tariq, and Omar Binladin. *Ashton* Complaint ¶ 556; *Burnett* Complaint ¶ 325. Khalifa listed the Mohammed Bin Laden Organization address on his visa application. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. Additionally, U.S.-designated terrorist Yassin Abdullah al-Kadi was allegedly introduced to the Global Diamond Resource's Chairman by an executive of SBG. *Ashton* Complaint ¶ 459; *Burnett* Complaint ¶ 328.

Plaintiffs claim that SBG had an address in Rockville, Maryland until very recently. *Ashton* Complaint ¶ 545; *Burnett* Complaint ¶ 313. SBG claims the Rockville address was the headquarters of a separately incorporated company, SBG USA, which was formally dissolved in December 1999. *See* SBG Memorandum in Support of Motion to Dismiss Ashton Complaint at 7 & Ex. 2 (articles of dissolution); *see also Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 52 (2d Cir.1991) (personal jurisdiction contacts determined at time complaint is filed); *but see Metro. Life*, 84 F.3d at 569 (holding courts should examine a defendant's contacts with the forum for a reasonable period prior to year of lawsuit and finding six years was reasonable).

The *Burnett* complaint does not contain any factual allegations against Tariq, Omar, or Bakr Binladin from which the Court could infer that they purposefully directed their activities at the United States, that they were members of a conspiracy pursuant to the New York long-arm statute, or that they have any general business contacts with the United States. Accordingly, the *Burnett* complaint against these three individuals is dismissed.

Rather than permitting a 12(e) statement, the Court finds jurisdictional discovery is warranted to determine if SBG purposefully directed its activities at the United States. *See Asip v. Nielsen Media Research,* No. 03 Civ. 5866(SAS), 2004 WL 315269, at *2 (S.D.N.Y. Feb. 18, 2004) (noting the purpose of Rule 12(e) is to "strike at unintelligibility rather than want of detail and . . . allegations that are unclear due to lack of specificity are more appropriately clarified by discovery"). Specifically, although the complaints are not specific about when, at the very least, SBG provided construction support to Osama bin Laden. *Ashton* Complaint ¶¶ 550, 552-53; *Burnett* Complaint ¶¶ 319-22. A branch of SBG allegedly look in an al Qaeda operative who listed the SBG branch address on his visa application. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. It is alleged to have ties to U.S.-designated terrorist Yassin Abdullah Al-Kadi. *Ashton* Complaint ¶ 459; *Burnett* Complaint ¶ 328. At this stage, the Court must accept as true Plaintiffs' contentions that SBG still contains Osama bin Laden's name in its corporate documents. *Ashton* Complaint ¶ 558; *Burnett* Complaint ¶ 329. Additionally, although it would not satisfy the due process requisites on its own, SBG's presence in Maryland three years before the complaints were filed, also warrants some discovery. Accordingly, SBG's motion

to dismiss the *Ashton* and *Burnett* complaints are denied without prejudice.

9. SAAR Network

The *Federal* Plaintiffs claim the SAAR Network is a network of "interrelated ostensible charities" that was established in the 1980s "to generate and surreptitiously transfer funds to terrorist organizations, including al-Qaeda." *Federal* Complaint ¶ 222. Several organizations within the SAAR Network, including SAAR Foundation, SAAR International, Safa Group, Mar-Jac Poultry, Mar-Jac Holdings, Inc., Safa Trust, Inc. and Aradi, Inc., were established, funded or closely affiliated with Defendant Suleiman Abdul Aziz al Rajhi. *Id.* at ¶ 223. By September 11, 2001, there were allegedly over one hundred entities in this network, "including the U.S. branches of MWL, IIRO and WAMY, [and the SAAR Network Defendants moving to dismiss here,] African Muslim Agency, Grove Corporate, Inc., Heritage Education Trust, International Institute of Islamic Thought, Mar-Jac Investment, Inc., Mena Corporation, Reston Investment, Inc., Sterling Charitable Gift Fund, Sterling Management Group, Inc., Success Foundation, and York Foundation." *Id.* ¶ 224. Allegedly, many of the entities are related by common management, few of them maintained a physical presence at their purported place of business, and they all "have long acted as fully integrated components of al Qaeda's logistical and financial support infrastructure." *Id.* ¶¶ 225, 226.

Plaintiffs argue the Court has personal jurisdiction over the SAAR Network because it participated in the conspiracy that resulted in catastrophic effects in this district. After an ongoing investigation in the Eastern District of Virginia, federal authorities

raided the offices of several of these Defendants in Herndon, Virginia in March 2002. *Id.* ¶ 227. The investigation has allegedly revealed that SAAR Network funds have been transferred to designated terrorists and al Qaeda operatives Youssef Nada and Ahmed Idris Nasreddin. *Id.* ¶ 228; *see* Exec. Order No. 13224 (designating individuals as terrorists). Additionally, Plaintiffs claim that the investigation has revealed that SAAR Network entities have engaged in transactions with Bait Ul-mal, Inc. (BMI), which has transferred funds to terrorist organizations including al Qaeda, and materially supported the 1998 embassy bombings in Africa. *Federal* Complaint ¶¶ 229-230.

[69] At this stage, the Court must accept as true Plaintiffs' allegations concerning the relationships of the SAAR Network. *Id.* ¶¶ 222, 226. Defendants correctly argue, however, that Defendants have provided scant basis for linking these entities under the SAAR Network title. Certain of these groups may be subject to personal jurisdiction in light of Plaintiffs' allegation that they purposefully directing [sic] its activities at the United States by transferring money to designated terrorists Youssef Nada and Ahmed Idris Nasreddin, particularly if they intended the money to support terrorism. *Id.* ¶ 228. Additionally, general jurisdiction could be appropriate for the SAAR Network entities having offices in Virginia. *Id.* ¶ 227. Accordingly, the SAAR Network's motion to dismiss is denied without prejudice. The parties are to engage in jurisdictional discovery to determine which of the Network's entities have a presence in Virginia and which entities transferred money to Nada and Nasreddin.

10. Adel A.J. Batterjee

The *Burnett* Plaintiffs claim that Defendant Adel A.J. Batterjee is an associate of Osama bin Laden. *Burnett* Complaint ¶ 181. On December 21, 2004, the U.S. Department of Treasury designated Mr. Batterjee as a Specially Designated Global Terrorist. *See* Dec. 23, 2004 Bierstein letter to Court; Exec. Order No. 13224. Mr. Batterjee is the chairman of Al Shamal Islamic Bank, "an instrumental bank in Osama bin Laden's financial support network." *Burnett* Complaint ¶ 365. Mr. Batterjee is also chairman of al-Bir Saudi Organization, whose United States branch, Defendant BIF, is allegedly a "front for al Qaeda sponsorship." *Burnett* Complaint ¶¶ 75, 196, 199. BIF is also a designated terrorist organization. *See* Exec. Order No. 13224. The Saudi government closed Al-Bir in 1993 "at the same time it was closing other organizations for ties to terrorism." *Burnett* Complaint ¶ 183. Mr. Batterjee then allegedly moved the charity's headquarters to Chicago in the name of BIF. *Id.* ¶ 183. Mr. Batterjee is listed as one of BIF's three founders in its articles of incorporation filed in Illinois. *Id.* ¶ 183. Through an alias, Mr. Batterjee allegedly sent money to BIF's branches. *Id.* ¶ 184; *see also* Decl. of Jodi Westbrook Flowers in Opp. to Batterjee Motion to Dismiss ("Flowers Decl.") Att. 5, p. 7 (BIF record showing $48,464 contribution by Abdel Abdul Jalil Batterjee). Mr. Batterjee allegedly transferred control of BIF to Defendant Enaam M. Arnaout, on September 15, 1997.[38] *Burnett* Complaint

[38] Mr. Arnaout was "criminally indicted for his role in the September 11, 2001 attacks." *Burnett* Complaint ¶ 199. But in its "written plea agreement, the government agreed to dismiss sensational and highly publicized charges of providing material support to terrorists and terrorist organizations." *United States v. Arnaout*, 282 F.Supp.2d 838, 843 (N.D.Ill.2003). The *Burnett*

¶ 183. In October 2001, Arnaout allegedly told Batterjee he was worried about being under scrutiny of the U.S. government and in January 2002, Batterjee requested that Aranout relocate his family to Saudi Arabia. *Id.* ¶¶ 217-218. Plaintiffs also claim that Mr. Batterjee's name is on a BIF list of wealthy Saudi Arabian sponsors of al Qaeda and Osama bin Laden. *Id.* ¶ 219.

Plaintiffs also claim that Defendant charity WAMY and BIF are closely connected and that Mr. Batterjee was the Secretary General of WAMY when he founded BIF in the United States. *Id.* ¶ 229; *see also* Flowers Decl. Att. 4, p. 3 (December 5, 1992 *New York Times* article quoting Adel A. Batterjee as the chairman of WAMY). In his capacity as Secretary General of WAMY, Mr. Batterjee allegedly commissioned a biography of Osama bin Laden and the origins of al Qaeda, which was jointly published by WAMY and BIF in 1991. *Burnett* Complaint ¶ 230.

With respect to his contacts with the United States, Plaintiffs claim that the documents filed in 1992 in conjunction with the establishment of BIF in Chicago state that Mr. Batterjee is a founder of BIF and that BIF's founders travel to the United States on a regular basis. *See* Flowers Decl. Att. 2, pp. 2-3. In 1993 BIF filed an application to conduct business in Florida and listed Mr. Batterjee as a director with an address in Florida. *See id.* at Att. 3, p. 4. BIF's

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Plaintiffs allege Mr. Arnaout and Osama bin Laden have ties. For example, law enforcement officials in Bosnia-Herzegovina raided BIF's offices in March 2002 and allegedly recovered documents establishing direct communications between Mr. Arnaout and Osama bin Laden in the late 1980s and early 1990s. *Burnett* Complaint ¶¶ 188, 196, 199.

authorization to do business in Florida was revoked on August 26, 1994. *Id.* at p. 1.

Mr. Batterjee disputes the claims against him in a declaration filed in conjunction with his motion to dismiss. Batterjee Decl. ¶ 8. He states he was born in Saudi Arabia, attended college in the United States in the 1960s, and returned to Saudi Arabia. *Id.* ¶¶ 3, 5. He claims he was last in the United States in June 2000 for personal reasons. *Id.* ¶ 5. He denies owning any real property, bank accounts, or investments in the United States. *Id.* ¶ 6. With respect to the allegations contained in the complaint, Mr. Batterjee claims BIF was never a branch of Al Bir or vice versa. *Id.* ¶ 9. He claims he never sent money to BIF in all of its history. *Id.* He states he transferred away all control of BIF in 1993. *Id.* He claims he never served as an executive of WAMY, never wrote a biography of Osama bin Laden, and denies having any knowledge of Osama bin Laden's or al Qaeda's activities other than what is widely published in the press. *Id.* ¶¶ 9, 10.

Mr. Batterjee also disputes the manner in which he was served. Plaintiffs reasoned that *Al-Quds Al-Arabia* had published Osama bin Laden's fatwas in the past and could, therefore, reach his supporters regardless of their location. Further, *The International Herald Tribune* is available to the world community. Additionally, Plaintiffs submit that these cases have been widely reported in the Arabic media and the complaints have been available on numerous websites for over two years. In light of these considerations and Judge Robertson's March 23, 2003 order approving service by publication for Defendants including Mr. Batterjee, the Court denies Mr. Batterjee's motion to quash service.

The Court finds the *Burnett* Plaintiffs made a prima facie showing of personal jurisdiction over Mr. Batterjee. While perhaps not dispositive on its own, Mr. Batterjee's designation as a terrorist lends substantial weight to Plaintiffs' claims that he purposefully directed his activities at the United States and that the exercise of personal jurisdiction over him comports with due process. *See Biton,* 310 F.Supp.2d at 178. Mr. Batterjee purportedly commissioned a book about al Qaeda and Osama bin Laden. He is the chairman of Al Shamal Islamic Bank, a bank with admitted and substantial ties to Osama bin Laden. *Burnett* Complaint ¶¶ 70, 79. Additionally, he is involved in the United States operations of designated terrorist, BIF. In the ten years leading up to the commencement of this action, Mr. Batterjee has had contacts with the United States that could be related to the terrorist attacks inasmuch as BIF participated in those attacks. Specifically, Mr. Batterjee traveled to Chicago for BIF and had an address in Florida for BIF. Accordingly, Mr. Batterjee's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is denied.

III. Failure to State a Claim

In considering Defendants' motions to dismiss for failure to state a claim under Rule 12(b)(6), the Court must "accept all of Plaintiffs' factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the Plaintiffs." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir.1999). Dismissal is not appropriate unless it appears beyond doubt, "even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *Id.*; *Conley v. Gibson*, 355 U.S. 41, 45-46, 78

S.Ct. 99, 2 L.Ed.2d 80 (1957). Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The Supreme Court reinforced these liberal pleading standards in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (observing the "short and plain statement" required by Rule 8 "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests'") (quoting *Conley*, 355 U.S. at 47, 78 S.Ct. 99). When presented with a 12(b)(6) motion, the district court may not consider matters outside of the pleadings without converting the motion into a motion for summary judgment. *Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir.2003); *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir.2000).

A. Elements of Claims

Plaintiffs claim that each Defendant provided material support to the al Qaeda terrorists who perpetrated the attacks on September 11, 2001. Under the ATA, material support includes money, financial services, lodging, training, safehouses, and false documentation or identification. 18 U.S.C. §§ 2339A(b), 2339B(g). Assuming such support is alleged, Plaintiffs will have to present a sufficient causal connection between that support and the injuries suffered by Plaintiffs. *See Burnett I*, 274 F.Supp.2d at 104. Proximate cause will support this connection. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir.1994) ("Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his

acts were a substantial factor in the sequence of responsible causation, and whose injury was reasonably foreseeable or anticipated as a natural consequence."). In light of al Qaeda's public acknowledgments of its war against the United States, the September 11 attacks may be the natural and probable consequence of knowingly and intentionally providing material support to al Qaeda. *Burnett I*, 274 F.Supp.2d at 104.

Plaintiffs rely on theories of concerted action liability—conspiracy and aiding and abetting—in support of this causal link. "Concerted action liability under New York law is based on the principle that '[a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer . . . are equally liable with him.'" *Pittman*, 149 F.3d at 122 (quoting *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 580, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982)). To be liable under either conspiracy or aiding and abetting, however, the defendant "must know the wrongful nature of the primary actor's conduct," *id.* at 123, and the conduct must be tied to a substantive cause of action, *Chrysler Capital Corp.*, 778 F.Supp. at 1267. In this regard, Plaintiffs rely on the ATCA, RICO, the TVPA, the ATA, and various state laws, including wrongful death, survival, intentional infliction of emotional distress, trespass, assault and battery, negligence, and negligent infliction of emotional distress.

1. ATCA

The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. "This statute confers subject matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law)." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir.1995); *see also Flores v. Southern Peru Corp.*, 343 F.3d 140, 143 n. 2 (2d Cir.2003). Certain Plaintiffs in these actions are aliens and the complaints all allege common law torts. The Court finds that "aircraft hijacking is generally recognized as a violation of international law." *Burnett I*, 274 F.Supp.2d at 100 (citing *Kadic*, 70 F.3d at 240; *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-49 (2d Cir.2000)). Further, "courts, including the Second Circuit, have almost unanimously permitted actions premised on a theory of aiding and abetting and conspiracy." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 311 (S.D.N.Y.2003). Accordingly, the ATCA may provide a basis for a concerted action claim of material support by alien-Plaintiffs here. *See Burnett I*, 274 F.Supp.2d at 100.

2. RICO

"To state a claim under civil RICO, a plaintiff must plead seven elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Berk v. Tradewell, Inc.*, Nos. 01 Civ. 9035, 01 Civ. 10068(MBM), 2003 WL 21664679, at *11 (S.D.N.Y. July 16, 2003) (quoting *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983)); *see also* 18 U.S.C. § 1962. "Civil RICO is an unusually potent weapon . . .

'courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.'" *Katzman v. Victoria's Secret*, 167 F.R.D. 649, 655 (S.D.N.Y.1996).

The *Federal* complaint asserts a RICO claim under § 1962(a), which states in part: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated a principal within the meaning of 18 U.S.C. § 2, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(a). "Because the conduct constituting a violation of § 1962(a) is investment of racketeering income, a plaintiff must allege injury from the defendant's investment of the racketeering income to recover under § 1962(a)." *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir.1990). The *Federal* Plaintiffs have not done that here and seem to abandon the § 1962(a) claim in their RICO statements. Accordingly, the *Federal* Plaintiffs have not stated a claim under 18 U.S.C. § 1962(a).

The *Federal* Plaintiffs' RICO statements against Arab Bank and the SAAR Network assert claims under § 1962(c) and § 1962(d). *See* 03 MDL1570 Docket 307, 309. Subsection (c) states, in part: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

racketeering activity." 18 U.S.C. § 1962(c). "The four elements of Section 1962(c) are '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *U.S. Fire Ins. Co. v. United Limousine Serv., Inc.*, 303 F.Supp.2d 432, 451 (S.D.N.Y.2004). "The elements of section 1962(c) must be established as to each individual defendant." *Id.* Paragraph (d) states that it "shall be unlawful for any person to conspire to violate any provision of" § 1962(a)-(c). 18 U.S.C. § 1962(d). "The Second Circuit has held in the context of a motion to dismiss that to state a claim under [§] 1962(d), the 'complaint must allege some factual basis for a finding of a conscious agreement among the defendants.'" *Am. Arbitration Ass'n, Inc. v. DeFonseca*, No. 93 Civ. 2424(CSH), 1996 WL 363128, at *7 (S.D.N.Y. June 28, 1996) (quoting *Hecht v. Commerce Clearing House*, 897 F.2d 21, 26 n. 4 (2d Cir.1990)); *see also Schmidt v. Fleet Bank*, 16 F.Supp.2d 340, 354 (S.D.N.Y.1998) ("Bare and conclusory allegations are insufficient to withstand a motion to dismiss and a plaintiff must plead facts sufficient to show that each defendant knowingly agreed to participate in the [RICO] conspiracy.").

Assuming for now that the Plaintiffs have pleaded an enterprise, "[u]nder *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), an alleged RICO defendant must have had 'some part in directing' the 'operation or management' of the enterprise itself to be liable." *Dubai Islamic Bank v. Citibank, N.A.*, 256 F.Supp.2d 158, 164 (S.D.N.Y.2003). The complaints allege the moving Defendants may have assisted al Qaeda, but they do not allege "anything approaching active 'management or operation.'" *Id.* Accordingly, the Court finds Plaintiffs have failed to state a RICO claim against the moving Defendants. *See id.; Red-*

tail Leasing, Inc. v. Bellezza, 95 Civ. 5191(JFK), 1997 WL 603496, at *5 (S.D.N.Y.1997) ("A defendant does not 'direct' an enterprise's affairs under § 1962(c) merely by engaging in wrongful conduct that assists the enterprise."); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 449, 466-67 (S.D.N.Y.1996) (providing services to racketeering enterprise is not directing the enterprise); *LaSalle Nat'l Bank v. Duff & Phelps Credit Rating Co.*, 951 F.Supp. 1071, 1090 (S.D.N.Y.1996) (same). Plaintiffs' RICO claim under § 1962(d) fails for the same reason. Plaintiffs have not alleged that the moving Defendants were central figures in the underlying schemes or for conspiracy liability under § 1962(d). The RICO claims against the moving Defendants are dismissed.

3. TVPA

"The TVPA establishes a cause of action in federal court against an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extrajudicial killing." *Arndt v. UBS AG*, 342 F.Supp.2d 132, 141 (E.D.N.Y.2004) (citing *Flores*, 343 F.3d at 153); 28 U.S.C. § 1350 note. Only individuals maybe sued under the TVPA. *Arndt*, 342 F.Supp.2d at 141 (citing *Friedman v. Bayer Corp.*, No. 99 Civ. 3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999)). Accordingly, to the extent Plaintiffs have not already withdrawn these claims, the TVPA claims are dismissed against Al Rajhi Bank, Saudi American Bank, Arab Bank, Al Baraka Investment & Development Corp., NCB, Saudi Binladin Group, and the SAAR Network. Similarly, there have been no allegations that Saleh Abdullah Kamel or Adel Batterjee acted under color of law and, therefore, the TVPA claims against these individuals are dismissed as well.

4. ATA

The ATA provides a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs." 18 U.S.C. § 2333(a).[39] To adequately plead the provision of material support under this section, a plaintiff would have to allege that the defendant knew about the terrorists' illegal activities, the defendant desired to help those activities succeed, and the defendant engaged in some act of helping those activities. *Boim II*, 291 F.3d at 1023; *see also Boim v. Quranic Literacy Inst.*, 340 F.Supp.2d 885, 906-913 (N.D.Ill.2004) ("*Boim III*") (granting summary judgment against two entity defendants where record evidence demonstrated the charities' concession that Hamas used terrorism in pursuit of its goals, the organizations' repeated desire to help Hamas by recruiting donations to the Holy Land

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[39] The ATA defines international terrorism as:

> activities that—(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended –to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1). For now, the Court assumes the attacks of September 11 were an act of international terrorism.

Foundation, a known supporter of Hamas, distributing pro-Hamas literature, and featuring pro-Hamas speakers at their meetings); *see also Burnett I*, 274 F.Supp.2d at 107 (noting the complaint in *Boim* was quite specific in its allegation of a causal link). Under a conspiracy theory, the Plaintiffs have to allege that the Defendants were involved in an agreement to accomplish an unlawful act and that the attacks of September 11 were a reasonably foreseeable consequence of that conspiracy. *See Boim III*, 340 F.Supp.2d at 895 (framing analysis as what plaintiffs have to prove to succeed on summary judgment). Plaintiffs do not have to allege that Defendants knew specifically about the September 11 attacks or that they committed any specific act in furtherance of that attack. *Id.*

5. Wrongful Death and Survival

New York Estates, Powers and Trusts Law governs Plaintiffs' claims of wrongful death and survival. "The personal representative . . . of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued." N.Y. Est. Powers & Trusts § 5-4.1 (McKinney 2002); *see also* N.Y. Est. Powers & Trusts § 11-3.2(b) (McKinney 2002) (outlining survival claim: "No cause of action for injury to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent."). Accordingly, the Court finds that if Plaintiffs are personal representatives and their allegations sufficiently allege that Defendants supported, aided and abetted, or conspired with the

September 11 terrorists, they will have also stated claims for wrongful death and survival.

6. Assault and Battery and Intentional Infliction of Emotional Distress

The *Federal* Plaintiffs bring claims of assault and battery and intentional infliction of emotional distress. The *Burnett* and *Ashton* Plaintiffs also allege claims of intentional infliction of emotional distress. The statute of limitations for assault and battery and intentional infliction of emotional distress is one year. *Holmes v. Lorch,* 329 F.Supp.2d 516, 523 (S.D.N.Y.2004); N.Y. C.P.L.R. 215(3) (McKinney 2002). The *Federal* Plaintiffs filed their complaint on September 10, 2003, nearly two years after September 11, 2001. Accordingly, their assault and battery and intentional infliction of emotional distress claims are dismissed against the SAAR Network and Arab Bank.

"Under New York law, a claim for intentional infliction of emotional distress requires a showing of (*l*) extreme and outrageous conduct; (2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress." *Stuto v. Fleishman,* 164 F.3d 820, 827 (2d Cir.1999) (citing *Howell v. New York Post Co.,* 81 N.Y.2d 115, 121, 596 N.Y.S.2d 350, 612 N.E.2d 699 (1993)). "'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" *Id.* (quoting *Howell,* 81 N.Y.2d at 122, 596 N.Y.S.2d 350, 612 N.E.2d 699). Courts are to determine whether the alleged conduct is sufficiently

extreme and outrageous enough to permit recovery. *Stuto*, at 827. The attacks on September 11, 2001 were undoubtedly extreme and outrageous. The Court finds that if the *Ashton* and *Burnett* Plaintiffs's allegations sufficiently allege that Defendants supported, aided and abetted, or conspired with the September 11 terrorists, they will have also stated a claim for intentional infliction of emotional distress. *See Burnett I*, 274 F.Supp.2d at 107-08 (analyzing claims under New York law).

7. Trespass

The *Federal* Plaintiffs bring a claim for trespass on the theory that Defendants assisted and encouraged those who intentionally entered the World Trade Center property. New York courts describe this cause of action as "the interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1361 (2d Cir.1989) (citing *Ivancic v. Olmstead*, 66 N.Y.2d 349, 352, 497 N.Y.S.2d 326, 488 N.E.2d 72 (1985)). To the extent that the *Federal* Plaintiffs sufficiently plead that Defendants acted in concert with the September 11 hijackers, they may proceed with this claim. *Wantanabe Realty Corp. v. City of New York*, 01 Civ. 10137(LAK), 2003 WL 22862646, at *4 (S.D.N.Y. Dec. 3., 2003) (citing *Pittman*, 149 F.3d at 122-23).

8. Negligence

In New York, a plaintiff may establish negligent infliction of emotional distress under the bystander or direct duty theory. *Baker v. Dorfman*, 239 F.3d 415, 421 (2d Cir.2000). Under the bystander theory, "a defendant's conduct is negligent as creating an unreasonable risk of bodily harm to a plaintiff and

such conduct is a substantial factor in bringing about injuries to the plaintiff in consequence of shock or fright resulting from his or her contemporaneous observation of serious physical injury or death inflicted by the defendant's conduct on a member of the plaintiff's immediate family in his or her presence." *Bovsun v. Sanperi,* 61 N.Y.2d 219, 223-24, 473 N.Y.S.2d 357, 461 N.E.2d 843 (1984). Under the direct duty theory, a plaintiff suffers emotional distress caused by "defendant's breach of a duty which unreasonably endangered [plaintiff's] own physical safety." *Mortise v. United States,* 102 F.3d 693, 696 (2d Cir.1996).

To establish a claim for negligence under New York law, "a plaintiff must show that the defendant owed the plaintiff a cognizable duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a proximate cause of that breach." *King v. Crossland Savings Bank,* 111 F.3d 251, 259 (2d Cir.1997). The most basic element of a negligence claim is the existence of a duty owed to plaintiffs by defendants. *Palsgraf v. Long Island R.R. Co.,* 248 N.Y. 339, 342, 162 N.E. 99 (1928); *see also Burnett I,* 274 F.Supp.2d at 108 (dismissing negligence claims against Defendant Al Haramain Islamic Foundation because complaint failed to allege or identify any duty owed to Plaintiffs). Banks do not owe non-customers a duty to protect them from the intentional torts of their customers. *Renner v. Chase Manhattan Bank,* No. 98 Civ. 926(CSH), 1999 WL 47239, at *13 (S.D.N.Y. Feb. 3, 1999) (citing cases); *Burnett I,* 274 F.Supp.2d at 109 ("Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other

routine banking service."). The complaints presently before the Court do not allege or identify a duty owed to Plaintiffs by moving Defendants. *See Burnett I*, 274 F.Supp.2d at 108-09. Accordingly, the negligence and negligent infliction of emotional distress claims are dismissed for failure to state a claim.

B. Analysis of Claims Against the Moving Defendants

While applying the liberal notice pleading requirements of Rule 8, the Court notes that in light of "the extreme nature of the charge of terrorism, fairness requires extra-careful scrutiny of Plaintiffs' allegations as to any particular defendant, to ensure that he—or it—does indeed have fair notice of [the claims]." *Id.* at 103-04.

1. Al Rajhi Bank

Al Rajhi Bank was founded in 1987 and now has a network of nearly 400 branch offices throughout Saudi Arabia and seventeen worldwide subsidiaries. *Burnett* Complaint ¶ 84. All the banking Defendants are alleged to have "provided essential support to the al Qaeda organization and operations. The banking Defendants in this lawsuit have acted as instruments of terror, in raising, facilitating and transferring money to terrorist organizations." *Burnett* Complaint ¶ 46. Plaintiffs claim that Al Rajhi Bank is "the primary bank for a number of charities that serve as al Qaeda front groups," including Al Haramain, MWL, WAMY, SJRC, and IIRO. *Burnett* Complaint ¶ 85; Rule 12(e) Statement ¶ 31. "Al Rajhi continues to maintain Al Haramain's accounts despite Al Haramain's designation on March 11, 2002 as terrorist organizations by both the United States and Saudi Arabian authorities." Rule 12(e) Statement

¶ 44. The *Burnett* Plaintiffs claim Al Rajhi Bank knew or had to know that its depositors, Defendant charities WAMY, MWL, IIRC, and SJRC were material supporters of terrorism. Rule 12(e) Statement ¶¶ 44-60.

The *Burnett* Plaintiffs claim that Saudi Arabia has "ineffective and/or rudimentary bank supervisory, anti-money laundering laws and anti-terrorist financing in place." Rule 12(e) Statement ¶¶ 72-78. In 1999, William Weschler of the National Security Council and Richard Newcomb of the Office of Foreign Assets Control traveled to Saudi Arabia to warn Al Rajhi Bank and its regulator, the Saudi Arabian Monetary Agency ("SAMA"), "that their financial systems were being manipulated or utilized to fund terrorist organizations such as Al Qaeda." *Id.* ¶ 75. The United States encouraged SAMA to adopt "know your customer" rules. *Id.* "Despite these warnings, Al Rajhi failed to adopt even the most minimal standards, [which] resulted in the use of Al Rajhi as an instrument of terror and a material supporter, aider and abettor of al Qaeda and international terrorist activities." *Id.* ¶¶ 76-77.

One of the hijackers on board American Airlines Flight 11, Abdulaziz al-Omari, held an account at Al Rajhi Bank. *Burnett* Complaint ¶ 85; Rule 12(e) Statement ¶ 43. Another hijacker, Mohammed Atta, made a transfer to this account at some time. Rule 12(e) Statement ¶ 43. Plaintiffs claim al Qaeda financier Zouaydi asked Abdullah bin Abdul Muhsen al Turki, a counselor to the government of Saudi Arabia, to send money through Al Rajhi. *Burnett* Complaint ¶¶ 388, 538.

The *Burnett* Plaintiffs also claim that Al Rajhi Bank has relationships with Hamas and other ter-

rorists. Rule 12(e) Statement ¶¶ 61-69. Al Rajhi Bank chose Texas-based Infocom to host its website. *Id.* ¶¶ 65, 66. Infocom has provided funding to Hamas and is owned and operated by Hamas leader and designated terrorist, Mousa Marzook. *Id.* There have been transfers made to Marzook and Infocom from Al Rajhi accounts. *Id.* In "December 1999, Al Rajhi directly funded Tulkarm Charity Committee, a known front for Hamas." *Id.* ¶ 71.

Members of the Al Rajhi family, which owns and controls Al Rajhi Bank, are alleged to have ties to Osama bin Laden's personal secretary. *Id.* ¶ 79. The Al Rajhi family is purportedly a major donor to the SAAR Network, a Defendant here, being investigated by federal authorities in Virginia. *Id.* ¶¶ 80-84. Finally, Al Rajhi family members are allegedly closely associated with wealthy donors to Osama bin Laden. *Id.* ¶ 85 (alleging ties with the Golden Chain).

Judge Robertson found that the only allegation in the Third Amended *Burnett* Complaint that stated a claim upon which relief could be granted was that Al Rajhi Bank acted as an instrument "of terror, in raising, facilitating and transferring money to terrorist organizations." *Burnett I,* 274 F.Supp.2d at 109 (quoting *Burnett* Complaint ¶ 46). Judge Robertson noted that there was no support "for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing services, or any other routine banking service." *Id.* In light of the liberal pleading standards, however, Judge Robertson denied Al Rajhi Bank's motion to dismiss and permitted it to request a more definitive statement under Rule 12(e). *Id.* at 110. The *Burnett* Plaintiffs provided an 89-paragraph response on August 27, 2003. Thereaf-

ter, Al Rajhi Bank renewed its motion to dismiss pursuant to Rule 12(b)(6).

Al Rajhi Bank argues that Plaintiffs offer no factual allegations in support of their conclusion that Al Rajhi Bank had to know that the charities it supported through Zakat and Hararm[40] payments were really fronts for al Qaeda. Al Rajhi Bank contends it had a legal and religious duty to make its charitable donations and any terrorist activity by the recipient charities was unknown to Al Rajhi Bank. *See* Rule 12(e) Statement ¶¶ 26, 29. Contrary to Plaintiffs' arguments, Al Rajhi Bank submits it did not have a duty, or a right, to inspect the Defendant charities' financial transactions to ascertain the ultimate destination of its donations. *But see* Rule 12(e) Statement ¶ 32 ("Al Rajhi is required to determine that the ultimate recipients of these contributions fall within one of the categories prescribed in the Quran for recipients of Zakat."). Al Rajhi Bank submits that SAMA did not implement any duty to investigate Zakat payments after its meeting with representatives of the National Security Council and Office of Foreign Assets Control.

Plaintiffs do not allege that Al Rajhi Bank provided direct material support to al Qaeda. Rather,

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[40] Under Islamic banking laws, Hararm is forbidden income that must be given away. The disposal of Hararm cannot be considered charitable giving. Rule 12(e) Statement ¶ 9. In the 12(e) statement, the *Burnett* Plaintiffs explain that al Qaeda takes advantage of the under-regulated Islamic banking system to move and launder money. 12(e) Statement ¶ 1. Plaintiffs allege that al Qaeda has perverted the Zakat and Hararm principles in Islamic banking to collect and distribute money to individuals and cells throughout the world. *Id.* ¶¶ 4-9; *see also Burnett* Complaint ¶ 43

Plaintiffs claim Al Rajhi Bank aided and abetted the September 11 terrorists by donating to certain Defendant charities and acting as the bank for these Defendants. New York law and the courts interpreting the ATA in *Boim* make very clear that concerted action liability requires general knowledge of the primary actor's conduct. *See Pittman,* 149 F.3d at 123; *Boim II,* 291 F.3d at 1023; *Boim III,* 340 F.Supp.2d at 906. Even with the opportunity to clarify their claims against Al Rajhi Bank, the *Burnett* Plaintiffs do not offer facts to support their conclusions that Al Rajhi Bank had to know that Defendant charities WAMY, MWL, IIRC, and SJRC were supporting terrorism. *See* Rule 12(e) Statement ¶¶ 44-60. "[A] complaint which consists of conclusory allegations unsupported by factual assertions fails even on the liberal standard of Rule 12(b)(6)." *De Jesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 70 (2d Cir.1996).

This Court, like Judge Robertson before it, has found no basis for a bank's liability for injuries funded by money passing through it on routine banking business. *See Burnett I,* 274 F.Supp.2d at 109. Similarly, allegations concerning the Al Rajhi family cannot support a claim against Al Rajhi Bank because there is no allegation that the family members were acting in furtherance of Al Rajhi Bank business. *Tasso v. Platinum Guild Int'l,* 94 Civ. 8288(LAP), 1997 WL 16066, at *6 (S.D.N.Y. Jan. 16, 1997). Plaintiffs attach to their opposition brief a September 2002 SAMA report summarizing the initiatives and actions taken by the Kingdom of Saudi Arabia to combat money laundering and terrorist financing. *See Burnett* Plaintiffs' Opp. to Al Rajhi Motion to Dismiss, Ex. 2. Neither this document, nor the complaint, alleges that SAMA or Al Rajhi Bank implemented "know your customer" rules that Al Rajhi

failed to follow with respect to accounts held by the Defendant charities. Finally, Plaintiffs' allegations that Al Rajhi Bank has connections to Hamas supporters fails to state a claim because Plaintiffs have not alleged any relationship between Hamas and al Qaeda or the terrorist attacks of September 11. Even accepting all the allegations against Al Rajhi Bank as true, Plaintiffs have failed to state a claim that would entitle them to relief. Accordingly, Al Rajhi Bank's motion to dismiss the *Burnett* complaint is granted in its entirety.

2. Saudi American Bank

Saudi American Bank is based in Rihadh, Saudi Arabia and was formed in 1980 pursuant to a royal decree to take over the then-existing branches of Citibank in Riyadh and Jeddah. *Ashton* Complaint ¶ 603; *Burnett* Complaint ¶ 140. It is the second largest bank in Saudi Arabia and has offices in the United States, based in New York. *Ashton* Complaint ¶ 604; *Burnett* Complaint ¶¶ 141-42. Its chairman, Abdullahziz Bin Hamad Al Gosaibi is also the Chairman of the Saudi Cement Company in Damman, Saudi Arabia. *Ashton* Complaint ¶ 605; *Burnett* Complaint ¶ 142.[41] Ahmed Ali Jumale, purportedly a close associate of Osama bin Laden and responsible for helping Defendant Al Baraka penetrate the United States banking system, allegedly worked for Saudi American Bank as a senior employee from

[41] The *Ashton* Plaintiffs voluntarily dismissed its claims against the Saudi Cement Company and the Arabian Cement Company on June 10, 2004. *See* 03 MD 1570 Docket # 230

1979 to 1986. *Ashton* Complaint ¶ 602; *Burnett* Complaint ¶ 148.[42]

Plaintiffs claim that Saudi American Bank is the official correspondent of the al Baraka Bank Lebanon; the Riyadh correspondent of Defendant Al Faisal Islamic Bank, which is managed by Defendant Prince Mohamed; and the Riyadh correspondent bank for a branch of Defendant Al Shamal Islamic Bank, which is involved in the financing of al Qaeda. *Ashton* Complaint ¶¶ 606, 608; *Burnett* Complaint ¶¶ 143, 146. It is also the bank for Defendant Dallah Al Baraka Group, which is chaired by Defendant Saleh Abdullah Kamel. Saudi American Bank is close to the Saudi Bin Laden family, . . . appears on its financial transactions" and provides banking services to its Sudanese operations. *Ashton* Complaint ¶¶ 607-8; *Burnett* Complaint ¶¶ 144, 146.

"In the year 2000, the Saudi American Bank participated in the fundraising campaign in Saudi Arabia for collecting donations to the 'heroes of the Al Quds uprising' (Intifada) by providing a bank account and facilities to receive donations for a committee of charity organizations including Defendants WAMY, IIRO and Al Haramain Foundation." *Ashton* Complaint ¶ 609; *Burnett* Complaint ¶ 147.

The essence of Plaintiffs' claim is that through its relationships with other banks and support of the Saudi Binladin group's work in Sudan, Saudi American Bank provided material support to al Qaeda. It is not alleged to have done anything to directly support al Qaeda, Osama bin Laden, or their terrorist

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[42] The *Ashton* Plaintiffs voluntarily dismissed their claims against Ahmed Nur Ali Jumale on June 10, 2004. *See* 03 MD 1570 Docket # 230

agenda. As the Court has stated before, there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided. The *Ashton* Plaintiffs have dismissed their claims against Ahmed Nur Ali Jumale, allegedly an associate of Osama bin Laden. To the extent the *Burnett* Plaintiffs continue their claims against him, his employment at Saudi American Bank from 1979 to 1986 cannot be grounds for relief. Osama bin Laden did not organize al Qaeda until the late 1980s, Saudi American Bank is not alleged to have provided Jumale with a veil of legitimacy or shelter. *Cf. Burnett I*, 274 F.Supp.2d at 104 (finding Al Haramain's employment of al Qaeda operative during height of al Qaeda activity a sufficient allegation of providing material support). The complaints have provided Saudi American Bank with no notice of Plaintiffs' claims or grounds for relief. Accordingly, Saudi American Bank's motions to dismiss the *Ashton* and *Burnett* complaints are granted in their entirety.

3. Arab Bank

The *Federal* Plaintiffs claim Arab Bank is a financial institution headquartered in Egypt with branch offices throughout the world, including New York. *Federal* Complaint ¶ 357. Arab Bank claims it is actually a Jordanian bank headquartered in Amman, Jordan. Arab Bank allegedly has "long provided financial services and other forms of material support to terrorist organizations, including al Qaeda." *Federal* Complaint ¶ 358. Further, these Plaintiffs allege that the September 11 attacks were a "direct, intended and foreseeable product of Arab Bank's par-

ticipation in al Qaeda's jihadist campaign." *Id.* ¶¶ 364, 363. These claims are based on the allegation that Arab Bank has "long known that accounts it maintained were being used to solicit and transfer funds to terrorist organizations [and despite this knowledge] Arab Bank has continued to maintain those accounts." *Id.* ¶ 362. Specifically, the *Federal* Plaintiffs claim Arab Bank accounts have been used for al Qaeda money transfers throughout the world and that Arab Bank maintains accounts for Defendant charities including IIRO, MWL, WAMY, BIF, Blessed Relief (Muwaffaq) Foundation, and Al Haramain. *Id.* ¶¶ 359, 360. Israeli officials allegedly have seized funds associated with several Arab Bank accounts maintained on behalf of known fronts for Hamas and identified by Arab Bank employees, "confirming the bank's specific knowledge that accounts it maintained were being used to sponsor terrorist activity." *Id.* ¶ 361.

The *Burnett* Plaintiffs claim that members of the Spanish al Qaeda cell used Arab Bank to make wire transfers. *Burnett* Complaint ¶ 138 (alleging Arab Bank is "used regularly by al Qaeda's Spanish cell for transfers of cash to members of al Qaeda operating in Germany, Pakistan, Afghanistan, Lebanon, Yemen, Bosnia, and elsewhere"); *id.* ¶¶ 139, 528 (alleging $6,400 wire transfer through Arab Bank from member of Spanish al Qaeda cell to an extremist associated with Chej Salah in Spain). These Plaintiffs conclude that "Arab Bank PLC has materially supported, aided, and abetted and financed al Qaeda." *Id.* ¶ 138.

The *Federal* and *Burnett* complaints do not include any facts to support the inference that Arab Bank knew or had to know that it was providing material support to terrorists by providing financial services to

the charity Defendants or by processing wire transfers in Spain. The paragraphs do not allege any involvement by, knowledge of, or participation in any wrongful conduct by Arab Bank. These Plaintiffs do not claim that Arab Bank ignored any regulations regarding their customer accounts. Providing routine banking services, without having knowledge of the terrorist activities, cannot subject Arab Bank to liability. While claiming Arab Bank has ties with known Hamas fronts, the *Federal* complaint does not contain any allegation of a connection between Hamas and Osama bin Laden, al Qaeda, or the September 11 attacks. A complaint alleging conclusions without supporting facts will not survive a Rule 12(b)(6) motion. *In re Cross Media Mktg. Corp. Sec. Litig.*, 314 F.Supp.2d 256, 261 (S.D.N.Y.2004). The *Federal* Plaintiffs asked for leave to amend their complaint with respect to Arab Bank, but they have not offered any facts to support an amendment. Therefore, Arab Bank's motions to dismiss the *Federal* and *Burnett* complaints are granted in their entirety.

4. Al Baraka Investment & Development Corporation and Saleh Abdullah Kamel

The *Ashton* and *Burnett* complaints detail nearly identical claims against Al Baraka Investment & Development Corp. ("Al Baraka") and Saleh Abdullah Kamel. *Ashton* Complaint ¶¶ 583-601; *Burnett* Complaint ¶¶ 47-66. Saleh Abdullah Kamel was born in Saudi Arabia in 1941 and founded Dallah Albaraka Group LLC in 1969. *Ashton* Complaint ¶ 587; *Burnett* Complaint ¶ 51. Dallah Albaraka is a diversified conglomerate based in Jeddah and includes twenty-three banks in Arab and Islamic countries. *Ashton* Complaint ¶ 588; *Burnett* Complaint ¶ 52.

Dallah Albaraka is a shareholder of Aqsa Islamic Bank, a bank that Israel has refused to approve, "citing its obvious ties with known terrorists." *Ashton* Complaint ¶¶ 596, 597; *Burnett* Complaint ¶¶ 60, 61. One of Dallah Albaraka's subsidiaries is Dallah Avco Trans-Arabia Co., based in Jeddah. *Ashton* Complaint ¶ 589; *Burnett* Complaint ¶ 53. Omar al Bayoumi, a suspect wanted by the FBI in connection with the September 11 attacks, was the Assistant to the Director of Finance for Dallah Avco and paid rent in San Diego for the house occupied by two September 11 hijackers of American Airlines Flight 77. *Ashton* Complaint ¶¶ 590, 592; *Burnett* Complaint ¶¶ 55, 54. Mr. Kamel is also one of three founders of Defendant Al Shamal Islamic Bank. *Ashton* Complaint ¶ 594; *Burnett* Complaint ¶ 58.

Dallah Albaraka's financial arm is Al Baraka Investment & Development Corp., a wholly owned subsidiary based in Jeddah. *Ashton* Complaint ¶ 593; *Burnett* Complaint ¶ 57. Al Baraka is a holding company with 43 subsidiaries, which are mainly banks in Arab and Islamic countries. *Ashton* Complaint ¶ 583; *Burnett* Complaint ¶ 47. It also has banks in Chicago, Illinois and Houston, Texas. *Burnett* Complaint ¶ 47. Al Baraka allegedly provided financial infrastructures in Sudan to Osama bin Laden through Defendant charity Al Haramain. *Ashton* Complaint ¶¶ 584, 585, 598; *Burnett* Complaint ¶¶ 48, 49, 62.

Plaintiffs do not offer any factual allegations against Al Baraka or Mr. Kamel to withstand their motions to dismiss. The majority of the complaints' allegations regarding Al Baraka actually concern Dallah Albaraka. The specific allegations against Al Baraka are that through Al Haramain it provided financial infrastructures in Sudan, it provided support

to Al Haramain, and it is present in the Sudan banking business through banks it holds. The complaints do not allege that Al Baraka knew or had any reason to know that Al Haramain was supporting terrorism, nor do they allege facts from which such an inference could be drawn.

The allegation that an employee of a Dallah Albaraka subsidiary financially supported two of the hijackers in San Diego does not translate into an allegation that Mr. Kamel provided material support to terrorism or aided and abetted those that provided material support. An employee's actions cannot be a basis for employer liability unless the employee was acting in furtherance of the employer's business. *Tasso,* 1997 WL 16066, at *6. There is no allegation that Mr. Kamel knew Mr. al Bayoumi or directed anyone at the Della Albaraka subsidiary to support al Qaeda or the hijackers. Similarly, the allegation that Mr. Kamel was one of three founders of Al Shamal Islamic Bank in 1983, without additional allegations, does not state a claim for relief. Thus, the *Ashton* and *Burnett* claims against Al Baraka and Mr. Kamel are dismissed in their entirety.

5. NCB

The *Ashton* and *Burnett* Plaintiffs' allegations against NCB are outlined in Part I.B.4. The Court finds it would be premature to analyze Plaintiffs' largely conclusory claims against NCB under Rule 12(b)(6) at this time. NCB may be immune from suit and further discovery if it is found to be an instrumentality of the Kingdom of Saudi Arabia and its actions do not fit within the FSIA's exceptions to immunity. Additionally, the Court is not yet convinced that it would be proper to exercise personal jurisdiction over NCB. Accordingly, NCB's motion to dismiss

for failure to state a claim is denied without prejudice. NCB may renew its motion upon completion of the limited jurisdictional discovery—first with respect to its instrumentality status—outlined by the Court above.

6. Saudi Binladin Group

The *Ashton* and *Burnett* allegations against the SBG are outlined in Part II.C.8. The same allegations that warrant limited jurisdictional discovery to investigate whether SBG purposefully directed its activities at the United States and its contacts with the United States preclude dismissal under 12(b)(6) at this time. SBG provided construction support to Osama bin Laden. *Ashton* Complaint ¶¶ 550, 552-53; *Burnett* Complaint ¶¶ 319-22. A branch of SBG purportedly provided shelter to an al Qaeda operative. *Ashton* Complaint ¶ 555; *Burnett* Complaint ¶ 324. SBG has, at some point, had a close relationship with Osama bin Laden, but the complaints do not specify when or whether the relationship continues. While these allegations are certainly not sufficient to reach a jury, if Plaintiffs demonstrate that this Court has personal jurisdiction over SBG they are entitled the opportunity to develop these claims. SBG's motions to dismiss the *Ashton* and *Burnett* complaints for failure to state a claim are therefore denied without prejudice.

7. SAAR Network

The *Federal* Plaintiffs' allegations against the SAAR Network are outlined in Part II.C.9. The Court's analysis of the SAAR Network's arguments in favor of 12(b)(6) dismissal depend on a predicate finding of which entities are subject to this Court's personal jurisdiction and which entities—and under

what circumstances—transferred money to terror fronts. Accordingly, the SAAR Network's motion to dismiss is denied without prejudice. It may be renewed upon completion of personal jurisdiction discovery.

8. Adel A.J. Batterjee

The *Burnett* Plaintiffs' allegations against Mr. Batterjee are outlined in Part II.C.10. For substantially the same reasons the Court found it had personal jurisdiction over Mr. Batterjee, it denies his motion to dismiss for failure to state a claim. The allegations against him and his designation as a terrorist are sufficient to permit the inference that he provided support to al Qaeda directly or through Al Shamal Islamic Bank, BIF, or WAMY. *Burnett* Complaint ¶¶ 75-76, 183-84, 196, 199, 230; Exec. Order 13224.

IV. Conclusion and Order

For the reasons explained above, Prince Sultan's motions to dismiss the *Burnett, Ashton, Tremsky, Salvo, Barrera,* and *Federal Insurance* complaints for lack of subject matter and personal jurisdiction are granted. Prince Turki's motions to dismiss the *Burnett, Ashton, Tremsky, Salvo, Barrera,* and *Federal Insurance* complaints for lack of subject matter and personal jurisdiction are granted. The Kingdom of Saudi Arabia's motion to dismiss the *Federal Insurance* and *Vigilant Insurance* complaints for lack of subject matter jurisdiction are granted. Prince Mohamed's motions to dismiss the *Ashton* and *Federal Insurance* complaints for lack of personal jurisdiction are granted. Mohammad Abdullah Aljomaih's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Sheikh Hamad al Husani's motion to dismiss the *Burnett* complaint for lack of

personal jurisdiction is granted. Abdulrahman bin Mahfouz's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Tariq, Omar, and Bakr Binladin's motion to dismiss the *Burnett* complaint for lack of personal jurisdiction is granted. Al Rajhi Bank's motion to dismiss the *Burnett* complaint for failure to state a claim is granted. Saudi American Bank's motions to dismiss the *Burnett* and *Ashton* complaints for failure to state a claim are granted. Arab Bank's motions to dismiss the *Burnett* and *Federal Insurance* complaints for failure to state a claim are granted. Al Baraka and Saleh Abdullah Kamel's motions to dismiss the *Burnett* and *Ashton* complaints for failure to state a claim are granted. NCB's motions to dismiss the *Burnett* and *Ashton* complaints for lack of subject matter and personal jurisdiction are denied without prejudice. The *Burnett* and *Ashton* negligence claims against NCB are dismissed for failure to state a claim. The Saudi Binladin Group's motions to dismiss the *Burnett* and *Ashton* complaints for lack of personal jurisdiction and failure to state a claim are denied without prejudice, but the TVPA and negligence claims against SBG are dismissed. The SAAR Network's motion to dismiss the *Federal* complaint for lack of personal jurisdiction and failure to state a claim is denied without prejudice. The RICO, TVPA, assault and battery, intentional infliction of emotional distress, and negligence claims against the SAAR Network are dismissed. Adel Batterjee's motion to dismiss the *Burnett* complaint is denied.

So ordered.

APPENDIX F

STATUTORY PROVISIONS

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in

immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights ....

* * * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

* * * *

[28 U.S.C. § 1605(a)(7) was repealed by Pub. L. No. 110-181, § 1083(b)(1)(A)(iii), 122 Stat. 3, 341 (Jan. 28, 2008).]

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed

under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

* * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 86-2255-RSWL

VINCENT CHIUDIAN
Plaintiff,

v.

PHILIPPINE NATIONAL BANK, a Philippine Corporation, RAUL DAZA, ANTONIO GARCIA, and RAMON GARCIA,
Defendants.

Date: March 21, 1988
Time: 9:00 a.m.
Court: "D"

STATEMENT OF INTEREST OF
THE UNITED STATES[1]

* * * *

DISCUSSION

I. THE FSIA IS NOT THE CONTROLLING AUTHORITY TO DETERMINE THE QUESTION OF SOVEREIGN IMMUNITY FOR MR. DAZA, BUT EVEN ASSUMING, *ARGUENDO*, IT WERE APPLIED, IT HAS NOT BEEN ESTABLISHED THAT MR. DAZA COULD BE SUED

[1] The United States files this Statement of Interest and appears pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

The "absolute theory" of immunity was recognized by Chief Justice Marshall in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812), and remained the governing law until 1952. In 1952, the Executive Branch formally adopted the "restrictive theory" of sovereign immunity with the issuance of the Tate Letter. 26 Dep't. State Bull. 984-985 (1952), *reprinted in Alfred Dunhill of London. Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976). In that letter, the State Department announced that, in the future, it would recommend to the courts that a foreign State be granted immunity only for sovereign or public acts (*juri imperii*) and not for private acts (*jure gestionis*). Finally in 1976, the restrictive theory of immunity was codified in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq.* (1976) (hereinafter referred to as "FSIA"). The Act assigns the duty of determining whether a sovereign is immune solely to the federal and state courts sitting without juries.

The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity of foreign states before Federal and State courts in the United States," but the Act "deals only with the immunity of foreign states." H.Rep. No. 94-1487, 94th Cong., 2d Sess. 12, 21, Sept. 9, 1976, *codified in* 1976 U.S. Code Cong. & Adm. News 6610, 6620. The instant suit is not styled as one against the PCGG, the instrumentality of the Republic of the Philippines, but against its member, Mr. Daza, in his individual capacity, so the FSIA does not apply. Even assuming, *arguendo*, the Court were to apply the FSIA, procedural requirements have not be [sic] met. 28 U.S.C. § 1608.

While courts appear not to have had occasion to squarely address this question, in the view of the United States, the immunity of officials should be determined in accordance with the general principles of sovereign immunity, rather than in accordance with the FSIA. While United States law, through the FSIA, recognizes only restrictive immunity for foreign sovereigns, the rationale for the FSIA's exceptions to absolute immunity—that a foreign sovereign doing business in the United States consents to United States jurisdiction over its commercial activities—does not apply to an official carrying out official duties for the sovereign. Such an official, as a general matter, should not be personally liable for such acts. Rather, the general rule is that an official should be shielded from personal liability for the performance of official functions. Of course, we do not address the possibility of extreme situations where overriding policy reasons may suggest liability is appropriate.

* * * *

APPENDIX H

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Nos. 06-1763, 06-2216.

KENSINGTON INT'L LTD.,

v.

BRUNO JEAN-RICHARD ITOUA and SOCIÉTÉ NATIONALE DES PÉTROLES DU CONGO.

May 23, 2007.

Letter Brief

U.S. Department of Justice, United States Attorney, Southern District of New York, 86 Chambers Street 3rd Floor, New York, New York 10007.

Dear Mr. Asreen:

The government respectfully submits this letter brief in response to the Court's letter of May 1 requesting our views regarding the above-captioned appeals. . . .

* * * *

1. *Common Law, Not the FSIA, Governs the Question Whether Defendant Itoua Has Immunity.*

The parties' contentions concerning defendant Itoua's immunity have centered on the FSIA. Itoua argues that he qualifies as an "instrumentality" of a foreign sovereign and thus is entitled to immunity according to the FSIA's terms. *See* Itoua Br. 21; Itoua Reply Br. 16-20. Plaintiff argues in turn that the FSIA's "agency or instrumentality" definition, 28 U.S.C. § 1603(b), does not encompass individual offi-

cials. See P1. Br. 43-44. Neither party has considered, however, whether Itoua may claim immunity from a source other than the FSIA, in particular the common law. Yet that is the question that should control.

As explained in a Statement of Interest filed by the government in a recently decided case in the Southern District of New York, *Matar v. Dichter,* 05 Civ. 10270 (WHP), 2007 WL 1276960 (S.D.N.Y. May 2, 2007), attached hereto and summarized below, the immunity of individual foreign officials is not governed by the FSIA. Rather, the immunity available to such officials stems from longstanding common law that the FSIA did not displace. While a number of courts, following the Ninth Circuit's decision in *Chuidian v. Philippine National Bank,* 912 F.2d 1095 (9th Cir. 1990), have construed the FSIA to extend to individuals, this construction is unsound and yields problematic results. Thus, the Court should reject Itoua's argument that he is immune as an instrumentality under the FSIA and, at the same time, remand for the district court to consider the question whether Itoua may claim immunity under pre-FSIA common law, as this question has not been raised or briefed by the parties on this appeal.

The *Dichter* Statement of Interest covers in detail how American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts—as reflected, for example, in opinions of the Attorney General dating from the early years of the Republic. *See Dichter* Statement of Interest [hereinafter *Dichter* Statement] at 4-7. This immunity remained in place even as the law of sovereign immunity evolved over time. *See id.* at 7-10. Thus, in the years

following the State Department's adoption of the "restrictive" theory of immunity in 1952, leading up to the codification of the theory in the FSIA, the State Department continued to recognize the immunity of individual officials for their official acts—as did the courts, following the Executive's lead. *See, e.g., Heaney v. Government of Spain,* 445 F.2d 501, 504 (2d Cir. 1971); *Greenspan v. Crosbie,* No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson,* 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960).

Notably, in at least one of these pre-FSIA cases, *Greenspan v. Crosbie,* individual foreign officials were found to be immune notwithstanding that their conduct fell within the restrictive theory's exception to immunity for commercial activity. There, plaintiffs sued the Province of Newfoundland and three of its individual officials for alleged violations of U.S. securities laws. 1976 WL 841, at *1. Even though the Department of State determined that the province was not immune since the suit involved commercial activity, the Department filed a suggestion of immunity for the individual defendants, reasoning that they had participated in this activity only in their official capacities. The court dismissed the individual defendants from the suit on this basis, while retaining jurisdiction over the province itself. *Id.* at *2. Thus, the State Department recognized, and the court accepted, that the individuals were immune from suit even though the foreign state itself was not.[2]

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[2] This differential treatment is analogous to the protection given federal employees under the Federal Tort Claims Act (FTCA). As amended by the Westfall Act, the FTCA permits suits against the government for the acts of its employees within the scope of their employment, *see* 28 U.S.C. § 1346

Following the enactment of the FSIA in 1976, the Ninth Circuit in *Chuidian* was the first circuit court to consider whether the statute had any application to individual officials. The court found that it did; specifically, the court held that individual officials fall within the statute's definition of an "agency or instrumentality of a foreign state" and so possess the same immunity afforded to such entities under the statute. 912 F.2d at 1103. In reaching this holding, the court unnecessarily and erroneously rejected the government's position—which was the same position the government recently asserted in *Dichter*–that immunity for foreign officials is instead rooted in the common law. *Id.* at 1102-03. A number of other courts have followed *Chuidian* in this respect, though without significant analysis, and without the benefit of briefing by the government. *See, e.g., Velasco v. Gov't of Indonesia,* 370 F.3d 392, 399 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal*, 182 F.3d 380, 388 (5th Cir. 1999); *El Fadl v. Cent. Bank of Jordan,* 75 F.3d 668, 671 (D.C. Cir. 1996*); but see Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (rejecting *Chuidian's* holding that the FSIA applies to individuals, yet failing to consider the possibility of common law immunity for individual officials). The district court in *Dichter* perfunctorily followed the *Chuidian* line of precedent as well, without any attempt to address the government's criticism of the decision. *See Dichter*, 2007 WL 1276960, at *4 n.2.

The Court should reject that approach here. For while *Chuidian's* outcome was correct to the extent that it preserved some form of immunity for individ-

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(b)(1), but immunizes the employees themselves from liability for the same conduct, *see* 28 U.S.C. § 2679(b)(1).

ual foreign officials, its statutory interpretation is misguided. The *Chuidian* court based its holding on the flawed rationale that "a bifurcated approach to sovereign immunity was not intended by the Act"—*i.e.*, that Congress intended the FSIA to be a "comprehensive" statute governing all sovereign immunity determinations, regardless of the nature of the defendant. *See Chuidian,* 912 F.2d at 1102. But this reading of the statute is inconsistent with its text and legislative history. The statutory text speaks only to the immunity of "foreign states," their political subdivisions, and any "agency or instrumentality of a foreign state," 28 U.S.C. §§ 603(a)-(b), terms that do not naturally describe individuals. Likewise, the legislative history's only reference to any type of individual official—diplomatic or consular representatives—clarifies that the FSIA does not govern their immunity since the statute "deals only with the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976) ("FSIA House Report"), 1976 U.S.C.C.A.N. 6604, 6620.

Moreover, contrary to *Chuidian's* premise, courts have followed "a bifurcated approach to sovereign immunity" in other contexts where the FSIA is silent. As numerous courts have held, because the FSIA does not address the immunity of heads of state, their immunity continues to be governed by common law as it was pre-FSIA. *See Dichter* Statement at 16 & n.12 (collecting cases); *see also Tachiona v. United States,* 386 F. 3d 205, 220-21 (2d Cir. 2004) (expressing doubt that the FSIA "was meant to supplant" common-law immunity for heads of state, given that the statute and legislative history make no reference to individual officials). The same reasoning applies to the immunity of individual officials other than heads of state: the FSIA did not address their immunity,

and so did not supplant it as it previously existed at common law.

Chuidian's mistaken analysis on this point is not of mere academic interest. By stretching the FSIA's terms to cover individual officials, the holding generates problematic implications. Most important, it implies that individual officials are subject to the same exceptions to immunity laid out in the FSIA for states and their agencies and instrumentalities—such that if an individual foreign official were sued, for example, over commercial transactions undertaken in an official capacity, the official would not be immune from suit and could be held personally liable for the conduct at issue. *See Chuidian,* 912 F.2d at 1103-06 (considering, after finding individual official's immunity to be governed by the FSIA, whether any of the FSIA's exceptions were met). There is no indication that Congress intended any such result—which, significantly, diverges from the common law as it existed at the time of the FSIA's enactment. As reflected in *Greenspan v. Crosbie, supra,* the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be. Thus, by subjecting the immunity of individual officials to the same limits applicable to the immunity of states and their agencies or instrumentalities, the *Chuidian* court's construction leaves foreign officials with less immunity than they enjoyed before the FSIA's enactment.

Furthermore, *Chuidian's* interpretation of the FSIA's "agency or instrumentality" definition as encompassing individual officials would imply that an

individual official's personal property qualifies as property of a state agency or instrumentality, making it subject to attachment according to the rules set forth in FSIA § 1610. Yet § 1610 was clearly intended to apply only to state-owned assets. *See* FSIA House Report at 27-30, 1976 U.S.C.C.A.N. at 6626-29. Notably, § 1610 affords litigants broader attachment rights with respect to property of state agencies or instrumentalities compared to property of the state itself: so long as an agency or instrumentality is "engaged in commercial activity in the United States," any of its property in the United States can be attached to satisfy any claim as to which it lacks immunity from suit. *See* 28 U.S.C. § 1610(b); *see also De Letelier v. Republic of Chile,* 748 F.2d 790, 798-99 (2d Cir. 1984). Another important difference is that an agency or instrumentality of a foreign state is subject to punitive damages under the FSIA, whereas the foreign state itself is not. *See* 28 U.S.C. § 1606. Thus, were the FSIA's "agency or instrumentality" definition read to encompass individual officials, litigants in any FSIA action would have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize the potential for recovery and to circumvent the FSIA's limitations on attachment and punitive damages that apply to a suit against the state itself. It defies common sense to believe that Congress intended these consequences.

For all of these reasons, the Court should decline Itoua's invitation to hold that he is immune under the FSIA as an "agency or instrumentality" of a foreign state. To the extent Itoua can claim immunity from suit, such immunity would have to rest on common law rather than any provision of the FSIA. By so holding, the Court would effectively preserve immunity for individual foreign officials while

avoiding the conceptual difficulties and problematic implications of the *Chuidian* approach.

* * * *

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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05 Civ. 10270 (WHP)

RA'ED MOHAMAD IBRAHIM MATAR, On behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalia; MAHMOUD SUBHAI AL HUWETI, on behalf of himself and his deceased wife Muna Fahmi Al Huweti, their deceased sons Subhai and Mohammed, and their injured children, Jihad, Tariq, Khamis, and Eman; and MARWAN ZEINO on his own behalf,

Plaintiffs,

v.

AVRAHAM DICHTER, former Director of Israel's General Security Service,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

* * * *

[T]he United States makes this submission in order to clarify its views on two issues with broad-reaching ramifications for U.S. interests: (1) whether foreign officials are immune from civil suit for their official acts; and (2) whether federal law recognizes a private cause of action for the disproportionate use of military force in armed combat.

As explained below, foreign officials such as Dichter do enjoy immunity from suit for their official acts. This immunity is not codified in the FSIA but instead is rooted in longstanding common law that the FSIA did not displace. Plaintiffs' apparent position that the FSIA eliminated this immunity runs contrary to the statute's text and legislative history, post-FSIA case law, and customary international law. Moreover, any refusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American officials.

* * * *

ARGUMENT

POINT I

DICHTER IS ENTITLED TO IMMUNITY

A. Foreign Officials Enjoy Immunity at Common Law for Their Official Acts, Which Was Not Displaced by the FSIA

The parties' immunity arguments in this case center on the FSIA: Dichter claims that he is entitled to the statute's protection, Def.'s Br. at 6-8, while plaintiffs argue that "[t]he FSIA does not extend sovereign immunity to individuals," Pls.' Br. at 3. This emphasis on the FSIA is understandable given that, following the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), a number of courts have analyzed the immunity of individual foreign officials under the statute's rubric. *See infra* at 13-19.

In the Government's view, however, this emphasis is misplaced. The Government agrees with Dichter that he is entitled to immunity, but that immunity resides in common law rather than the FSIA. As explained below, individual foreign officials have long been recognized to hold immunity from suit with respect to their official acts. Contrary to plaintiffs' argument, this immunity was not displaced by the enactment of the FSIA. Rather, common-law immunity for foreign officials endures as a vital complement to the FSIA's grant of immunity to foreign states—for, absent the former, litigants could easily circumvent the latter, frustrating the important purposes served by the statute.

1. *Immunity for Foreign Officials Acting in an Official Capacity Was Well-Established at Common Law prior to the Enactment of the FSIA*

   a. *Official Immunity before the Issuance of the Tate Letter in 1952*

The doctrine of foreign sovereign immunity, broadly construed, extends deep into American jurisprudence, having been established as a matter of common law well before Congress enacted the FSIA in 1976. As the Supreme Court stated two decades prior to the FSIA's enactment: "Very early in our history this immunity was recognized, and it has since become part of the fabric of our law. It has become such solely through adjudications of this Court." *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358-59 (1955) (citations omitted).

The seminal expression of the sovereign immunity doctrine was set forth nearly 200 years ago by Chief Justice Marshall in *The Schooner Exchange v.*

McFadden, 11 U.S. (7 Cranch) 116 (1812), which "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden v. B.V. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). *The Schooner Exchange* also introduced the practice of deferring to "suggestions of immunity" by the Department of State wherever made in individual cases, or, in the absence of such determinations, deferring to State Department policies concerning foreign immunity generally. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943). This deference reflected a basic function of foreign sovereign immunity—the avoidance of cases that might fray relations with foreign sovereigns—and the corresponding need to follow the lead of the Executive as the branch of government responsible for foreign affairs. *See Hoffman*, 324 U.S. at 35 ("'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.") (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)).

The "absolute" immunity of the sovereign was, early on, generally understood to encompass not only the state and the head of state,[3] but also other

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[3] *See* S.V. George, *Head of State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1058-59 (Dec. 1995) ("Historically, sovereign immunity for states and head-of-state immunity were considered one and the same because the head-of-state was considered to be the equivalent of the state.").

individual officials insofar as they acted on the sovereign's behalf. Thus, even prior to the *Schooner Exchange* case, statements recognizing immunity for the official acts of foreign officials appear in the opinions of the Attorney General. *See* 1 Op. Att'y Gen. 45, 46 (1797) (concerning civil suit brought against governor of French island for seizure of a ship: "I am inclined to think, if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action; that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers; and that the extent of his authority can, with propriety or convenience, be determined only by the constituted authorities of his own nation."); 1 Op. Att'y Gen. 81 (1797) (concerning suit brought against British official: "[I]t is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.").

Expressions of official-act immunity likewise appear in subsequent federal case law. Thus, in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Supreme Court rejected a suit brought against a Venezuelan general for acts undertaken in his official capacity in Venezuela, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders."

Id. at 252.[4] The more common fact pattern, though, involved suits against consular officials, who by virtue of their position had a regular presence within the United States. Unlike diplomatic officials, whose immunity extended even to acts of a personal nature, consular officials were viewed as possessing the same immunity as a state's non-diplomatic officers generally—*i.e.*, immunity from suit only for acts within the scope of their official duties. *See Arcaya v. Paez*, 145 F. Supp. 464, 466-467 (S.D.N.Y. 1956) (collecting pre-1952 cases for the proposition that "a consul is not immune from suit except when the action is based upon acts which he has committed within the scope of his duties"); *see also Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929) ("[I]n actions against the officials of a foreign state not clothed with diplomatic immunity, it can be said that suits based upon official, authorized acts, performed within the scope of their duties on behalf of the foreign state, and for which the foreign state will have to respond directly or indirectly in the event of a judgment, are actions against the foreign state."). Thus, prior to 1952, which marks the beginning of modern sovereign immunity jurisprudence in the United States, foreign officials were already understood to enjoy immunity for their official acts.

b. Official Immunity after the Tate Letter

In 1952, the State Department issued the Tate Letter, which announced that the Department would no

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[4] Although the holding in *Underhill* is more widely cited as an expression of the "act of state" doctrine, the Supreme Court has recognized that "sovereign immunity provided an independent ground" for the holding. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430 (1964).

longer follow the absolute theory of sovereign immunity set forth in *The Schooner Exchange*. Instead, the letter explained that the Department would follow the so-called "restrictive theory" of sovereign immunity, according to which a foreign state enjoys immunity as to its "public," *i.e.*, sovereign, activities, but not for its "private," *i.e.*, commercial, activities. *See generally Alfred Dunhill of London v. Republic of Cuba*, 425 US. 682, 697-706 (1976); *see also id.* 712-15 (appended text of Tate Letter). This evolution in policy reflected similar developments in foreign jurisdictions, driven by "the widespread and increasing practice on the part of governments of engaging in commercial activities." *Id.* at 714.

The adoption of the restrictive theory did not change the rule applicable to individual officials, however. As before the Tate Letter, the State Department continued to recognize the immunity of foreign officials for their official acts in suggestions of immunity made to the federal courts. *See* Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau, eds.) ("Immunity Decisions Report"), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, at 1020, 1037 (No. 19), 1075-77 (Nos. 96 & 97) (reporting suggestions of immunity for individual officials). Likewise, the federal courts continued to defer to such suggestions when they were presented. *See Greenspan v. Crosbie*, No. 74 Civ. 4734 (JCM), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960). And where no suggestion was made, courts applied the same general rule of decision. *See Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (noting in *dicta* that the immunity of a foreign state extends to any official or agent of the state with respect to their

official acts). Thus, the Restatement (Second) of Foreign Relations Law of the United States (1965), published during this time period, includes official-act immunity among the various dimensions of immunity belonging to foreign sovereigns.[5]

Notably, in at least one of the post-Tate Letter cases, *Greenspan v. Crosbie, supra*, the immunity of individual foreign officials was recognized to be unlimited by the restrictive theory's exceptions to immunity for commercial activity—and thus broader than the immunity of the state itself. In the case, plaintiffs sued the Province of Newfoundland and three of its individual officials for alleged violations of U.S. securities laws. 1976 WL 841, at *1. Pursuant to the restrictive theory, the Department of State determined that the Province was *not* immune from claims for compensatory damages with respect to the securities sales at issue, given that the sales constituted commercial activity. *Id.*; *see also* Immu-

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[5] The Second Restatement states that the immunity of a foreign state extends to:

> (a) the state itself;
>
> (b) its head of state and any person designated by him as a member of his official party;
>
> (c) its government or any governmental agency;
>
> (d) its head of government and any person designated by him as a member of his official party;
>
> (e) its foreign minister and any person designated by him as a member of his official party;
>
> (f) *any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state;*
>
> (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state.

Id. § 66(f) (emphasis added).

nity Decisions Report at 1076. The Department nevertheless filed a suggestion of immunity recognizing the individual officials to be fully immune for their participation in this same activity, reasoning: "although it is alleged that the defendant officials of the Province of Newfoundland acted in excess of their authority, it is not alleged that these officials acted other than in their official capacities and on behalf of the Province." Immunity Decisions Report at 1076. Accordingly, this Court declined to exercise jurisdiction as to these individual defendants, finding that "[t]he Suggestion of Immunity removes the individual defendants from this case"—even while the court went on to exercise jurisdiction as to the Province itself. *Greenspan*, 1976 WL 841, at *2. Hence, the State Department recognized, and this Court accepted, that insofar as the individual defendants had acted on behalf of the state, their actions were not attributable to them in their personal capacity; they were instead attributable only to the state, and accordingly the state was the only proper defendant in the case.[6] Decided in late 1976, *Greenspan* reflects the scope of common-law immunity for individual foreign officials as it existed when the FSIA was enacted that same year.[7]

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[6] This application of immunity resembles the way in which immunity for federal employees works under the Federal Tort Claims Act ("FTCA"). Under the so-called "Westfall Amendment" to the Act, in any tort action filed against a federal employee, the United States is substituted as party defendant upon certification by the Attorney General that the acts at issue were performed in the employee's official capacity. *See* 28 U.S.C. § 2679(d).

[7] The Immunity Decisions Report also describes an unpublished 1968 case in which the State Department declined to suggest immunity for a "non-profit organization funded by the Caribbean governments" or its liaison officer, after concluding

2. *The FSIA Did Not Displace Common-Law Immunity for the Official Acts of Foreign Officials*

a. Statutory Text and Legislative History

Contrary to plaintiffs' apparent position that the enactment of the FSIA in effect "eliminated" sovereign immunity for "individuals acting in their official capacity," *see* Pls.' Br. at 4, there is no suggestion anywhere in the FSIA's text or legislative history that the statute was intended to effect any change whatsoever in the immunity previously recognized for individual foreign officials. The text of the statute makes no mention of the immunity belonging to individual foreign officials, but rather speaks only to the immunity of "foreign states" and any "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1605, 1610. Likewise, the legislative history's only reference to any type of individual official—diplomatic or consular representatives—clarifies that the FSIA does not govern their immunity since the statute "deals only with the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976), 1976 U.S.C.C.A.N. 6604, 6620 ("FSIA House Report").

The statute's exclusive focus on states and their agencies and instrumentalities is explained by the history leading up to its enactment. The fundamental

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that the organization's function was commercial in nature, being analogous to that of a labor union or private employment agency. *Id.* at 1062-63 (No. 62). The Report does not explain why the Department did not suggest immunity for the official involved, but an official of a non-profit organization providing employment services to a number of governments is clearly distinguishable from the provincial government officials involved in *Greenspan*.

problem Congress sought to address at the time was an ongoing explosion in commercial litigation against foreign states and state enterprises engaged in commerce with the United States, and the concomitant need to regularize such litigation under a system of clear and predictable rules. *See* FSIA House Report at 7, 1976 U.S.C.C.A.N. at 6605 ("In a modem world where foreign state enterprises are every day participants in commercial activities, [the FSIA] is urgently needed legislation."); *see also Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) ("[The FSIA] was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities."). The regime ushered in by the Tate Letter had proven unworkable: the State Department lacked significant fact-finding machinery by which to guide application of the restrictive theory in cases allegedly concerning commercial activity, and moreover, foreign governments seeking determinations of immunity were prone to exert diplomatic influence. FSIA House Report at 8-9, 1976 U.S.C.C.A.N. at 6607. As a result, these determinations were characterized by a lack of uniformity and transparency and became a burden on the State Department. *Id.* Thus, at the urging of the Executive Branch, Congress enacted the FSIA in order to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law," so as to render it susceptible to application directly by the courts, without the need for State Department involvement. *Id.* at 7, 44-46, 1976 U.S.C.C.A.N. at 6605, 6634-35. By contrast, cases particularly concerning individual foreign officials had posed no significant problems in the past and were not the impetus for the new legislation. *Cf*

Tachiona v. Mugabe, 169 F. Supp. 2d 259, 290 (S.D.N.Y. 2001) (concluding that issues regarding head-of-state immunity "were not yet 'in the air' as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment"), *rev'd in part on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

Accordingly, there is no reason to believe that in enacting the FSIA, Congress intended, *sub silentio*, to alter or eliminate the pre-existing common-law immunity for individual foreign officials. Indeed, the FSIA was not intended to effect *any* major change from the *status quo ante* with respect to substantive rules of immunity. It was instead intended to "codify" the restrictive theory, "as presently recognized." FSIA House Report at 7, 1976 U.S.C.C.A.N. at 6605. Given that Congress expressly sought to preserve the pre-existing immunity rule for foreign states, it would be incongruous to believe that Congress simultaneously abrogated the long-standing immunity of individual foreign officials. *See Chuidian*, 912 F.2d at 1101-02 ("It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment."); *see also Tachiona*, 169 F. Supp. 2d at 276 (rejecting argument that the FSIA was "intended to enunciate a substantive redirection of United States international relations policy").

Indeed, in the compilation of the State Department's pre-FSIA immunity decisions published immediately after the FSIA's enactment, the editors—officials of the State Department and Department of Justice who had been involved in the statute's drafting—specifically noted that the FSIA was not in-

tended to eliminate the precedential effect of past "decisions concerning the immunity of heads of state and of other nondiplomatic and nonconsular officials." Immunity Decisions Report at 1020. As the editors noted: "These decisions may be of some future significance, because the [FSIA] does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities." *Id.*[8]

b. Post-FSIA Case Law

Reading the FSIA to eliminate immunity for individual foreign officials would conflict not only with the statute's text and legislative history, but also with post-FSIA case law. Since the statute's enactment, numerous circuit courts have continued to recognize the existence of immunity for individual foreign officials with respect to their official acts,[9] as

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[8] The continuation of common law immunities post-FSIA finds an analogy in the federal tort context. In 1946, the enactment of the FTCA comprehensively codified the sovereign immunity of the United States as to common law tort claims. *See* Pub. L. No. 601 (1946). Yet, the immunity of individual federal officials from such claims was unaffected by the statute's enactment and continued to evolve separately at common law, *see, e.g., Barr v. Matteo*, 360 U.S. 564 (1959), until Congress, in response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), amended the FTCA so as to afford individual federal officials immunity by statute. *See* H.R. Rep. 100-700, at 2-3 (1988), 1988 U.S.C.C.A.N. 5945, 5945-46 (discussing background of amendment).

[9] *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 402 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporation Forestal*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). In the one exception cited by the plaintiffs—*Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005)—

have numerous judges in this district.[10] In so holding, courts have broadly agreed on the functional rationale for this immunity—*viz.*, that "a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian*, 912 F.2d at 1101; *accord*, *e.g.*, *Velasco*, 370 F.3d at 399; *In re Terrorist Attacks*, 349 F. Supp. 2d at 788; *Doe I v. Israel*, 400 F. Supp. 2d 86, 104 (D.D.C. 2005); *see also Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990) (finding sovereign immunity to protect individual officers on the ground that "a government does not act but through its agents"). Hence, courts have recognized, rightly, that unless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA. *See Chuidian*, 912 F.2d at 1102 ("Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly.").

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the court found only that such immunity was not provided *by the FSIA*. *Id.* at 882 ("[W]e conclude, based on the language of the FSIA, that the FSIA does not apply to General Abubakar. . . ."). The court was not presented with, and thus had no occasion to consider, the Government's argument here, *viz.*, that such immunity is rooted in common law that was unaffected by the FSIA's enactment.

[10] *See, e.g.*, *In re Terrorist Attacks*, 392 F. Supp. 2d 539, 551 (S.D.N.Y. 2005); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 286-87 (S.D.N.Y. 2001); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 (S.D.N.Y. 1996); *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995); *Kline v. Kaneko*, 685 F. Supp. 386, 389 (S.D.N.Y. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981).

However, while the rationale for the immunity recognized in these cases has thus been cogently identified, the source of the immunity has not been. In *Chuidian*, the leading circuit case, the Ninth Circuit identified the FSIA as the source; specifically, the court held that individual officials fall within the statute's definition of an "agency or instrumentality of a foreign state" and so possess the same immunity afforded to such entities under the statute. 912 F.2d at 1103. In reaching this holding, the court unnecessarily and erroneously rejected the Government's position—which was the same as the position asserted here—that immunity for foreign officials is instead rooted in the common law. *Id.* at 1102-03. A number of other courts have followed *Chuidian* in this respect, though without significant analysis, and without the benefit of briefing by the Government. *See, e.g., El-Fadl*, 75 F.3d at 671; *Keller*, 277 F.3d at 815.[11] Other courts, however, have declined to read the FSIA's "agency or instrumentality" definition as encompassing natural persons, but nonetheless have recognized a "judicially created" extension of the statute's protection to individual officials. *Velasco*, 370 F.3d at 398-99 ("Although the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state."); *Herbage*, 747 F. Supp. at 66 ("Nowhere does the FSIA discuss the liability or role of natural persons . . . . Nonetheless, decisions in other federal courts, as well as reason, indicate—even if only indirectly—that the sover-

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[11] Although the Government agreed with the result in *Chuidian*, it has never endorsed the *Chuidian* approach to foreign official immunity and has not filed any brief revisiting the source of foreign official immunity since *Chuidian* was decided.

eign immunity granted in the FSIA. does extend to natural persons acting as agents of the sovereign."); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1120 (D.D.C. 1996) (same).

The latter line of cases is closer to (though still wide of) the mark; for, while *Chuidian's* result was correct, its statutory interpretation is unpersuasive. The *Chuidian* court based its holding on the flawed premise that "a bifurcated approach to sovereign immunity was not intended by the Act"—*i.e.*, that Congress intended the FSIA to be a "comprehensive" statute governing all sovereign immunity determinations, regardless of the nature of the defendant. *See Chuidian*, 912 F.2d at 1102. As indicated above, such a reading of the statute is inconsistent with its text and legislative history. *See supra* at 10-13. Moreover, courts have in fact followed such "a bifurcated approach to sovereign immunity" in cases involving heads of state. As numerous courts have held, because the FSIA does not address the immunity of heads of state, their immunity continues to be governed by common law as it was pre-FSIA.[12] The Sec-

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[12] *See, e.g., United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir.1997) ("Because the FSIA [does not address] head-of-state immunity, . . . head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny."); *Tachiona*, 169 F. Supp. 2d at 276 (rejecting the proposition that the FSIA was intended to set forth "a uniform rule of law to govern all assertions of foreign immunity, including head-of state immunity"); *First Am. Corp.*, 948 F. Supp. at 1119 ("[T]he enactment of the FSIA was not intended to affect the power of the State Department . . . to assert immunity for heads of state or for diplomatic and consular personnel."); *Aristide*, 844 F. Supp. at 137 ("The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with re-

ond Circuit recently expressed this view in *dicta* in *Tachiona v. United States*, 386 F. 3d 205 (2d Cir. 2004):

> We have some doubt as to whether the FSIA was meant to supplant the "common law" of head-of-state immunity, which generally entailed deference to the executive branch's suggestions of immunity. For one thing, the FSIA applies only to foreign states, which are defined as including "political subdivision[s]," and "agenc[ies] or instrumentalit[ies]" thereof. "[A]genc[ies] [and] instrumentalit[ies]" in turn are defined in terms not usually used to describe natural persons. Moreover, the only references to heads of state or other foreign officials in the FSIA's legislative history suggest that their immunity is not governed by the Act.

Id. at 220-21 (citations omitted). The same reasoning applies to the immunity of individual officials *other* than heads of state: the FSIA did not address their immunity, and so did not supplant it as it previously existed at common law.[13]

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spect to heads-of-state."). Cases involving diplomats and consular officials have likewise been decided outside the confines of the FSIA, as courts have instead looked to specific treaties governing diplomatic and consular relations, *see, e.g., Tachiona*, 169 F. Supp. 2d at 215-220, as envisioned in the FSIA's legislative history, FSIA House Report at 21, 1976 U.S.C.C.A.N. at 6620.

[13] Thus, while plaintiffs prominently rely on the above passage from *Tachiona* for the proposition that "the FSIA does not apply to individuals," Pls.' Br. at 5, the passage cuts against their argument in the end. The view expressed in the passage is not merely that the FSIA does not extend immunity to individuals, but that the statute does not *rescind* such immunity either.

Further, *Chuidian's* attempt to stretch the FSIA's "agency or instrumentality" definition to cover individual officials leads to problematic results. For example, this reading implies that individual officials are subject to the same *exceptions* to immunity laid out in the FSIA for states and their agencies and instrumentalities—such that if an individual foreign official were sued, for example, over commercial transactions undertaken in an official capacity, the official would not be immune from suit and could be held personally liable for the conduct at issue. *See Chuidian*, 912 F.2d at 1103-06 (considering, after finding individual official's immunity to be governed by the FSIA, whether any of the FSIA's exceptions were met). This result diverges from the common law as it existed at the time of the FSIA's enactment. As reflected in *Greenspan v. Crosbie*, *supra*, the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be. *See supra* at 9-10. Thus, by subjecting the immunity of individual officials to the same limits applicable to the immunity of states and their agencies or instrumentalities, the *Chuidian* court's construction leaves foreign officials with less immunity than they enjoyed before the FSIA's enactment. This change in substantive law was unanticipated not only by Congress, but apparently by the *Chuidian* court itself—which thought its reading of the FSIA's "agency or instrumentality" definition would *preserve* the immunity previously afforded to individual officials under common law. *See Chuidian*, 912 F.2d at 1101 ("If in fact the Act does not include such officials, the Act

contains a substantial unannounced departure from prior common law").[14]

Along similarly problematic lines, *Chuidian* would also seem to imply that an individual official's *personal* property qualifies as property of a state agency or instrumentality, making it subject to attachment according to the rules set forth in § 1610—even though § 1610 was clearly intended to apply only to state-owned assets. *See* FSIA House Report at 27-30, 1976 U.S.C.C.A.N. at 6626-29. Notably, § 1610 affords litigants broader attachment rights with respect to property of state agencies or instrumentalities compared to property of the state itself: so long as an agency or instrumentality is "engaged in commercial activity in the United States," any of its property can be attached to satisfy any claim as to which it lacks immunity from suit. *See* 28 U.S.C. § 1610(b); *see also Letelier v. Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984).[15] Thus, were "agency or instrumentality" read to encompass individual officials, litigants in any action brought under the FSIA would have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize the potential for recovery and to circumvent the FSIA's limitations on attachment of

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[14] Notably, a rule allowing suit against an individual official if the state itself is not immune would diverge from the approach endorsed by Congress in the federal tort context—where federal employees are completely immunized from suit for their official-capacity acts, even if the federal government has waived its own sovereign immunity as to those acts. *See supra* n.6.

[15] By contrast, property of the state itself can be attached only if the property sought for attachment is used for commercial activity and various other conditions are met. *See* 28 U.S.C. § 1610(a).

property of the state itself. It defies common sense to believe that Congress intended these consequences.[16]

Accordingly, this Court should find Dichter to be immune from suit for his official acts and should rest this holding on common law rather than any provision of the FSIA. While official immunity serves, importantly, to prevent circumvention of the FSIA, it is not itself codified in the FSIA, but instead is afforded by common law that the FSIA did not displace. This holding would be consistent with the results reached in the accumulated post-FSIA case law on point, yet at the same time would avoid the conceptual difficulties and troublesome implications entailed by the *Chuidian* approach.[17]

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[16] Yet another problem concerns service of process. The FSIA imposes stricter requirements for service of process on a foreign state as opposed to its agencies or instrumentalities. *See* 28 U.S.C. § 1608; *see also, e.g., Magness v. Russian Federation*, 247 F.3d 609, 614-617 (5th Cir. 2001). Under the *Chuidian* approach, litigants in any FSIA case might circumvent those stricter requirements by suing, and, accordingly, serving, an individual official rather than the state itself.

[17] Even if the FSIA did govern the immunity of a foreign official, however, Dichter would be entitled to immunity, and plaintiffs' claims brought under the ATS and the TVPA would be subject to dismissal. As the Supreme Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the ATS does not supply a jurisdictional basis for claims against a foreign state since the FSIA is "the sole basis for obtaining jurisdiction of a foreign state in our courts." *Id.* at 434. Moreover, the FSIA does not recognize an exception to immunity for torts committed outside the territory of the United States. *Id.* at 439-43. The FSIA thus bars plaintiffs from bringing their ATS and TVPA claims against Israel and, accordingly, would bar such claims against Dichter were his immunity governed by the statute as well.

c. International Law

A final reason to reject the idea that the FSIA eliminated immunity for individual foreign officials is that any such holding would bring U.S. sovereign immunity law into conflict with customary international law. The FSIA was enacted partly in order to bring U.S. foreign immunity law into line with prevailing international practice, *see* FSIA House Report at 7-8, 1976 U.S.C.C.A.N at 6605-06, and should be construed compatibly with customary international law absent a specific reason to the contrary. As stated by the district court in *Tachiona*:

> Authorities recognize that the growth of international law is evolutionary. It expands by accretion as consensus develops among nations around widely recognized customs, practices and principles, and not by patchwork elevation of any one country's *ad hoc* pronouncements. Thus, any dramatic deviation from accepted international norms legislated by any single state without reference to widely accepted customary rules would be inconsistent with this principle.

169 F. Supp. 2d at 276-77; *cf. Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135 (2d Cir. 2005) ("[W]here legislation is ambiguous, it should be interpreted to conform to international law.") (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Like U.S. law, customary international law has long recognized that foreign officials enjoy civil immunity for their official acts. As explained by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia:

> Such officials are mere instruments of a State and their official function can only be attributed

> to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity.' This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

Prosecutor v. Blaskic (*Issue of subpoena duces tecum*), 110 I.L.R. 607, 707 (1997) (citing cases))[18]

These principles have been applied in several significant foreign jurisdictions, some with immunity statutes that, like the FSIA, make no mention of individual officials. Thus, most recently, the House of Lords recognized immunity from civil suit for official-capacity acts even though the United Kingdom's immunity statute did not "expressly provide[] for the case where suit is brought against the servants or agents, officials or functionaries of a foreign state"; the court reasoned that "[t]he foreign state's right to immunity cannot be circumvented by suing its servants or agents." *Jones v. Ministry of Interior*, UKHL 26, ¶ 10 (House of Lords, United Kingdom 2006). Likewise, a Canadian appellate court has held that "[t]he fact that [Canada's immunity statute] is silent on its application to employees of the foreign state can only mean that Parliament is content to have the

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[18] Although this holding was rendered by a criminal tribunal, it specifically concerned an issue of civil process—specifically, the tribunal's power to enforce a subpoena to state officials acting in their official capacity.

determination of which employees are entitled to immunity determined at common law. . . . There is nothing in the State Immunity Act which derogates from the common law principle that, when acting in pursuit of their duties, officials or employees of foreign states enjoy the benefits of sovereign immunity." *Jaffe v. Miller*, 95 ILR 446, 459-60 (Ontario Court of Appeal, Canada 1993). Germany's national court has reached the same result. *Church of Scientology v. Commissioner of the Metropolitan Police*, 65 ILR 193 (Federal Republic of Germany, Federal Supreme Court 1978) (recognizing immunity for head of Scotland Yard: "The acts of such agents constitute direct State conduct and cannot be attributed as private activities to the person authorized to perform them in a given case.").

The United Nations Convention on Jurisdictional Immunities of States and their Property ("UN Immunity Convention") embodies the most current effort to codify international law concerning foreign sovereign immunity. U.N. Doc. A/RES/59/38 (Dec. 16, 2004), *available at* http://untreaty.un.org/English/notpubl/English_3_13.pdf. While the United States has not signed the Convention and does not necessarily agree that the Convention accurately reflects customary international law in every particular, it does view the Convention's treatment of individual officials as consistent with customary international law to the extent that it clothes individual officials with the immunity of the state. The Convention generally grants immunity to states, and defines the term "State" to include "representatives of the State acting in that capacity." *See id.* Art. 2, ¶ 1(b)(4). As explained in the drafting committee's commentary, this provision reflects the understanding that official capacity acts are properly attributed to the state

itself rather than the individual whom the state acts through:

> It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they represent. The foreign State, acting through its representatives, is immune *ratione materiae*. Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity.

Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session, ¶ 18, p. 25, U.N. Doc. A/46/10 (Jul. 19, 1991).

In light of all of the foregoing authorities, any reading of the FSIA that would eliminate the immunity historically recognized for individual foreign officials would constitute a "dramatic deviation from accepted international norms," and should be rejected. *Tachiona*, 169 F. Supp. 2d at 276-77. Indeed, parting with this international consensus would threaten serious harm to U.S. interests, by inviting reciprocation in foreign jurisdictions.[19] Given the global leadership

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[19] *See Hilton v. Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciproc-

responsibilities of the United States, its officials are at special risk of being made the targets of politically driven lawsuits abroad—including damages suits arising from alleged war crimes.[20] The immunity defense is a vital means of deflecting these suits and averting the nuisance and diplomatic tensions that would ensue were they to proceed. It is therefore of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn. As the Supreme Court has stated in a related context:

> In light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens. Recent history is replete with attempts, some unfortunately successful, to harass and harm our ambassadors and other diplomatic officials. These underlying purposes combine to make our national interest in protecting diplomatic personnel powerful indeed.

Boos v. Barry, 485 U.S. 312, 323-24 (1988). Thus, this Court should adhere to prevailing international

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ity."); *see also Garb v. Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (describing the concept of reciprocity as a "touchstone[] of international law").

[20] Even more worrisome, foreign *criminal* courts might look to U.S. civil immunity rules in an effort to justify assertions of jurisdiction over U.S. officials.

norms, which are reflected in our own common law, and afford Dichter immunity for his official acts.

* * * *

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Dec. 19, 2007]

Docket No. 07-2579-cv

RA'ED IBRAHIM MOHAMAD MATAR, on behalf of himself and his deceased wife Eman Ibrahim Hassan Matar, and their deceased children Ayman, Mohamad and Dalia, MAHMOUD SUBHAI AL HUWEITI, on behalf of himself and his deceased wife Muna Fahmi Al Huweiti, their deceased sons Subhai and Mohammed and their injured children, Jihad, Tariq, Khamis, and Eman and MARWAN ZEINO, on his own behalf,

Plaintiffs-Appellants,

v.

AVRAHAM DICHTER, former Director of Israel's General Security Service,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

Preliminary Statement

Pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a), the United States respectfully submits this *amicus* brief in support of affirmance.

* * * *

The district court was correct to dismiss the case on immunity grounds, but the court erred in basing its decision on the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611. The immunity of individual officials is governed not by the FSIA but by principles of foreign official immunity as recognized by the Executive. In articulating those principles, the Executive acts against the backdrop of international law—which it recognizes and develops in conducting the United States' relations with other states—and the Executive is uniquely positioned to consider how its stance will affect the Government's ability to assert immunity on behalf of U.S. officials sued in foreign courts. Before the FSIA, the courts deferred conclusively to the Executive on questions concerning the immunity of foreign sovereigns and their officials, out of respect for the Executive's foreign affairs powers under the Constitution. The enactment of the FSIA in 1976 was meant to displace that practice for foreign states, but—critically for this case—not for foreign officials, whose immunity rests upon related, but separate, principles.

As evidenced by its text and legislative history, the FSIA addresses only the immunity of foreign states and their agencies and instrumentalities; it does not address the immunity of individual officials. Under separation of powers principles, a clear statement is required in a statute before courts may find a legislative intent to restrict an authority traditionally exercised by the Executive. There is no clear statement in the FSIA that Congress intended to supplant the Executive's traditional authority to recognize the immunity of foreign officials. Accordingly, that authority continues to reside in the Executive as it did before the FSIA.

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ARGUMENT

Defendant Is Immune from This Suit

A. Foreign Official Immunity Is Controlled Not by the FSIA but by Principles of Customary International Law as Recognized by the Executive.

1. Before the FSIA, Courts Deferred to Executive Determinations of Immunity for Foreign Officials.

The immunity of foreign officials from suit in U.S. courts is rooted in the more general customary international law doctrine of foreign sovereign immunity, first enunciated in American jurisprudence in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). There, Chief Justice Marshall held that, as "a matter of comity, members of the international community"—including the United States —"had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases." *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004). The opinion further explained that "wrongs committed by a sovereign" generally raise "questions of policy [rather] than law," and hence "are for diplomatic rather than legal discussion." *Schooner Exchange*, 11 U.S. at 146; *see also In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) ("[S]ensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision.").

For this reason, in suits brought against foreign sovereigns prior to the FSIA, courts routinely deferred to "suggestions of immunity" by the Executive.

Schooner Exchange, 11 U.S. at 147; *see Republic of Mexico v. Hoffman,* 324 U.S. 30, 34-36 (1945); *Ex Parte Peru,* 318 U.S. 578, 587-89 (1943). When the Executive declined to appear in such suits, courts would decide the foreign state's immunity, but "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Hoffman,* 324 U.S. at 35. The Supreme Court made clear that [i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.; see also Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 358-59 (2d Cir. 1964) (holding that, where no suggestion of immunity is received, "the court must decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type.").

This deferential judicial posture was not merely discretionary; it was rooted in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins,* 335 U.S. 160, 173 (1948). Given the Executive's leading foreign-policy role, it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" on questions of foreign sovereign immunity. *Hoffman,* 324 U.S. at 36; *see also Vencedora Oceanica Navigation, S.A. v. Compagnie Nationale Algerienne,* 730 F.2d 195, 198 n.4 (5th Cir. 1984) ("*Schooner* rested on the theory of separation of powers, under which potentially embarrassing foreign affairs were the domain of the executive branch.").

The immunity of a foreign sovereign was, early on, generally understood to encompass not only the state, heads of state, and diplomatic officials, but also other officials insofar as they acted on the state's behalf. For example, in *Underhill v. Hernandez,* 168 U.S. 250 (1897), the Supreme Court rejected a suit against a Venezuelan general for actions taken in his military capacity, holding that the defendant was protected by "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." *Id.* at 252. In the decades immediately preceding the FSIA as well, courts deferred to Executive suggestions recognizing foreign officials as immune for their official acts, *see Greenspan v. Crosbie,* No. 74 Civ. 4734 (JCM), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson,* 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960), and where no suggestion was made, they followed the same general rule of decision, *see Heaney v. Government of Spain,* 445 F.2d 501, 504 (2d Cir. 1971) (noting the immunity owed to foreign officials for their official acts).

2. The FSIA Codified the Immunity of Foreign States, but Did Not Affect the Executive's Constitutional Authority to Recognize the Separate Immunity of Foreign Officials.

a. For much of the Nation's history, the Executive followed an absolute theory of foreign sovereign immunity, "under which a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Permanent Mission of India to the U.N. v. City of N.Y.*, 127 S. Ct. 2352, 2356 (2007). Under that theory, it was relatively easy for courts to

determine immunity "in conformity to the principles accepted by" the Executive, *Hoffman*, 324 U.S. at 35.

In 1952, however, in recognition of developments in international law, the State Department adopted a "restrictive" rule of foreign sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity. *See generally Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976). Application of this rule "proved troublesome," as sovereign and commercial acts were sometimes difficult to distinguish. *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Moreover, because courts had to determine immunity for themselves when the Executive did not appear, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id.*

At the urging of the Executive, Congress worked to remedy this problem by enacting the FSIA in 1976. The FSIA codified the restrictive rule of foreign sovereign immunity in line with prevailing international practice and set forth "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden*, 461 U.S. at 489. The statute thereby charged the courts with making immunity determinations in specific cases against foreign states, applying the principles adopted by the political branches.

b. The text and the history of the FSIA make clear, however, that Congress separated the immunity of *foreign states and their agencies or instrumentalities* on the one hand from the immunities of *foreign offi-*

cials and heads of state on the other. Only the immunity of the former is addressed by the statute. Thus, the recognition of immunity for foreign officials and heads of state remains within the authority of the Executive, as before the FSIA.

The FSIA's text nowhere purports to address the immunity of individual foreign officials. Rather, it speaks only to the immunity of "foreign state[s]" and includes within the definition of "foreign state" any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). As this Court has already noted, these are "terms not usually used to describe natural persons." *Tachiona v. United States*, 386 F.3d 205, 221 (2d Cir. 2004).

The statutory term "agency or instrumentality" in particular cannot properly be read to include individual officials. The term is defined as:

> any *entity*—
>
> (1) which is a *separate legal* person, *corporate or otherwise*, and
>
> (2) which is an *organ* of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by* a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States *as defined in section 1332(c) and (e) of this title* [providing, in pertinent part, that corporations shall be deemed citizens of any U.S. state where they are incorporated], nor *created* under the laws of any third country.

28 U.S.C. § 1603(b) (emphases added). Even if an individual might in some other context be encompassed by the term "agency or instrumentality" (although

usually a natural person would be referred to as an "agent"), the statutory definition here makes clear that the term applies only to corporate and other organizational entities, not individuals. *See Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). Had Congress meant the FSIA to codify the immunity of foreign officials as well, it would have used ordinary terminology to make its intention clear. *Id.*

This reading of the FSIA's text is repeatedly confirmed by its legislative history. For example, in clarifying that the FSIA would not affect diplomatic or consular immunity, the House report states that the statute "deals only with the immunity of foreign states." H.R. Rep. No. 94-1487, at 21 (1976). Further, in acknowledging that the statute does not address questions of discovery, the report explains that "[e]xisting law appears to be adequate in this area," and specifically cites the protection afforded by "official immunity." *Id.* at 23 ("[I]f a plaintiff sought to depose a diplomat . . . or a high-ranking official of a foreign government, diplomatic and official immunity would apply."). Similarly, in outlining courts' authority under the FSIA to order an injunction or specific performance against a foreign state, the report cautions that "this is not determinative of the power of the court to enforce such an order" because "a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction." *Id.* at 22.

All of these passages show that Congress understood the immunity of states and their agencies and instrumentalities under the FSIA to be distinct from the immunities of individual officials, which Congress saw no need to codify or disturb. In contrast to cases involving states and their agencies and instrumen-

talities, which had proven problematic under the restrictive theory, cases concerning individual foreign officials were relatively rare, had not presented significant doctrinal difficulties in the past, and were simply not the impetus for the new legislation. *Cf. Tachiona v. Mugabe,* 169 F. Supp. 2d 259, 290 (S.D.N.Y. 2001) (stating that issues regarding head-of-state immunity "were not yet 'in the air' as part of the underlying concerns that prompted the FSIA nor in the debate and deliberations that accompanied the enactment"), *rev'd in part on other grounds sub nom. Tachiona v. United States,* 386 F.3d 205 (2d Cir. 2004).

Under separation of powers principles, the only permissible inference from the FSIA's silence concerning the immunity of foreign officials is that Congress did not attempt to supplant the Executive's long-recognized authority to recognize and define their immunity, as informed by customary international law. "When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear." *Armstrong v. Bush,* 924 F.2d 282, 289 (D.C. Cir. 1991); *see also United States v. Bass,* 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in decision.").* The FSIA makes

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* Similarly, insofar as principles of foreign sovereign immunity were applied by the courts in a common law manner in pre-FSIA cases where the Executive did not appear, the FSIA should not be found to have displaced that practice with respect to foreign officials in the absence of a clear statement. *See Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a

clear Congress's intention to codify the immunity rules governing *foreign states;* but Congress did not indicate *any* intention to eliminate the Executive's long-established authority and practice as to the immunity of foreign officials.

c. Other courts have mistakenly held that the FSIA does regulate the immunity of foreign officials. In particular, in *Chuidian v. Philippine National Bank,* the Ninth Circuit adopted a strained reading of the FSIA, holding that its coverage extends to a foreign official as "an agency or instrumentality of a foreign state." 912 F.2d 1095, 1101-03 (9th Cir. 1990).

In so ruling, the *Chuidian* court rejected the Government's argument that the FSIA did nothing to change preexisting practice concerning foreign official immunity. *Id.* at 1102. The court opined that Congress did not intend a "bifurcated approach to sovereign immunity"—under which courts would determine the immunity of foreign states, and the Executive would continue to determine the immunity of foreign officials—because "every indication shows that Congress intended the Act to be comprehensive." *Id.* The court recognized that the statute does "not explicitly include individuals within its definition of foreign instrumentalities," but it was persuaded that Congress intended to transfer foreign official immunity determinations to the courts because "[n]owhere in the text or legislative history does Congress state that individuals are not encompassed within the section 1603(b) definition." *Id.* at 1101.*

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presumption favoring the retention of long-established and familiar principles . . . ").

* Other courts of appeals have followed *Chuidian,* though with little independent analysis and without the benefit of

But *Chuidian's* analysis is precisely backwards. Absent a clear statement from Congress, courts may not construe a statute as attempting to restrict Executive authority, especially when that authority is constitutionally grounded. *See supra* at 12; *cf. Olegario v. United States,* 629 F.2d 204, 227-28 (2d Cir. 1980) (upholding Executive action in the face of congressional silence because it was "based on policy considerations traditionally, although not exclusively, associated with the executive branch").

Chuidian's analysis is also inconsistent with other courts' holdings that, notwithstanding the FSIA, the Executive retains the authority to assert the immunity of foreign heads of state—the availability of which does not turn on the immunity of the foreign state itself under the FSIA. *Ye v. Zemin,* 383 F.3d 620, 627 (7th Cir. 2004) ("Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch."); *United States v. Noriega,* 117 F.3d 1206, 1212 (11th Cir. 1997) (same); *see also Tachiona,* 386 F.3d at 220 ("We have some doubt as to whether the FSIA was meant to supplant the 'common law' of

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briefing from the Government. *See Guevara v. Republic of Peru,* 468 F.3d 1289, 1305 (11th Cir. 2006); *Velasco v. Gov't of Indonesia,* 370 F.3d 392, 398-99 (4th Cir. 2004); *Keller v. Cent. Bank of Nigeria,* 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporation Forestal y Industrial de Olancho S.A.,* 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan,* 75 F.3d 668, 671 (D.C. Cir. 1996). *But see Enahoro v. Abubakar,* 408 F.3d 877, 881-82 (7th Cir. 2005) (rejecting *Chuidian*'s holding that the FSIA applies to individuals). Likewise, the district court here followed *Chuidian* without any attempt to address the Government's criticism of the decision. *See Matar v. Dichter,* 500 F. Supp. 2d 284, 289 n.2 (S.D.N.Y. 2007).

head-of-state immunity, which generally entailed deference to the executive branch's suggestions of immunity.").

Chuidian's approach not only undermines a function traditionally exercised by the Executive under our constitutional framework; it also yields troubling practical consequences. Specifically, construing the FSIA's "agency or instrumentality" definition to cover individual officials would categorically subject those officials to suit whenever a foreign agency or instrumentality is subject to suit under an FSIA exception. *See Chuidian*, 912 F.2d at 1103-06 (considering, after finding the FSIA to govern defendant official's immunity, whether any of the FSIA's exceptions were met). Under this approach, for example, a foreign official would always be subject to suit *personally* for a *state's* commercial transactions. *See* 28 U.S.C. § 1605(a)(2).

Yet, there clearly are circumstances in which foreign officials are protected by official immunity even when the state itself lacks immunity for the underlying conduct. Indeed, the Executive has asserted foreign official immunity in such circumstances in the past. *See Greenspan*, 1976 WL 841, at *2 (deferring to suggestion of immunity for foreign officials involved in state commercial activity even though the foreign state was not itself immune). Moreover, consular officials, former diplomatic officials, and officials of international organizations all enjoy immunity for acts performed in the exercise of their official functions, and their immunity is not limited by the exceptions applicable to foreign states under the FSIA.* Analogously under the Federal Tort Claims

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* *See* Vienna Convention on Consular Relations ("VCCR"), arts. 43(1), 45, *done* Apr. 24, 1963, 21 U.S.T. 77; Vienna

Act, a federal official cannot be sued for his official conduct even where the United States itself may be held liable. *See* 28 U.S.C. § 2679(d). It is unclear why any different rule should apply in the context of foreign official immunity.

The United States asserts immunity for its own officials when they are sued in foreign courts, and thus it is important that this issue be resolved by the Executive, after careful consideration of both international law and foreign policy consequences—including, importantly, the impact on the United States' ability to shield its officials from liability in foreign jurisdictions in cases where the United States itself is subject to suit. *Chuidian*'s approach pays no heed to such considerations and instead extends the FSIA's exceptions to individual officials simply as a collateral consequence of its counter-textual construction of the statute.

Equally troubling, *Chuidian*'s approach would also seem to imply that an individual official's personal property qualifies as property of a state "agency or instrumentality," making it subject to attachment under the FSIA. Significantly, the FSIA affords litigants broader rights to attach the property of state agencies or instrumentalities compared to property of states themselves, *see* 28 U.S.C. § 1610; and it also allows for punitive damages against agencies or instrumentalities but not against states themselves, *see id.* § 1606. Were individual officials considered "agencies or instrumentalities" under the FSIA, litigants in any FSIA action would therefore have an obvious in-

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Convention on Diplomatic Relations ("VCDR"), arts. 32, 39(2), *done* Apr. 18, 1961, 23 U.S.T. 3227; International Organizations Immunities Act ("IOIA"), 28 U.S.C. § 288d(b).

centive to name as many individual foreign officials as possible as defendants, in order to maximize potential recovery and circumvent the FSIA's limitations on attachment and damages against the state.

Yet another problem is raised by the parties' briefs in this case. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the Supreme Court held that, because the FSIA's "instrumentality" definition is phrased in the present tense, an instrumentality's status under the FSIA—that is, whether it is majority-owned by a foreign state—must be assessed at the time of suit rather than the time of the conduct at issue. *See id*, at 478. Plaintiffs argue by analogy that former officials such as Dichter cannot invoke the FSIA's protections if the officials were not employed by the state at the time of suit. *See* Pls.' Br. 13-16. However, the Executive recognizes that foreign officials retain immunity for their official acts after leaving their positions and views any contrary rule as rife with potential to disturb foreign relations. Indeed, if plaintiffs were correct, every official act of a foreign state could be made the subject of litigation in our courts as soon as one of the officials involved left his post. Such a rule would have very significant reciprocal implications in foreign courts for former officials of the United States.*

These practical problems vividly illustrate that the FSIA was not designed to govern foreign official im-

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* Moreover, any FSIA-based exception to immunity for former foreign officials would deviate sharply from the immunities enjoyed by diplomats, consular officials, and officials of international organizations, all of whom retain forms of functional immunity after leaving their posts. *See* VCCR, art. 39(2); VCDR, art. 53(4); *De Luca v. United Nations Org.*, 841 F.Supp. 531, 534 (S.D.N.Y.), *aff'd*, 41 F.3d 1502 (2d Cir.1994).

munity, and that *Chuidian's* attempt to stretch the statute to cover individual officials is ill-considered. By unmooring foreign official immunity from its anchor in the Executive, and instead tying it rigidly to the FSIA and its treatment of the distinct immunity of the state, the *Chuidian* approach generates immunity rules that stray from those recognized by the Executive. That, in turn, carries potentially problematic consequences for the Executive's conduct of foreign affairs and its ability to ensure U.S. compliance with, and appropriately shape, international law.

Precisely to avoid such results, courts historically deferred to the Executive's authority to articulate customary international law in this area. *Hoffman,* 324 U.S. at 35. Accordingly, this Court should hold that the Executive retains that authority with respect to the immunity of foreign officials, as before the FSIA. . . .

* * * *

APPENDIX K

PARTIES TO THE PROCEEDINGS BELOW

Listed below are the parties in the proceedings below.

The *Federal Insurance*, *Vigilant Insurance* and *Pacific Employers* Petitioners

Federal Insurance Company
Pacific Indemnity Company
Chubb Custom Insurance Company
Chubb Indemnity Insurance Company
Chubb Insurance Company of Canada
Chubb Insurance Company of New Jersey
Great Northern Insurance Company
TIG Insurance Company
Vigilant Insurance Company
One Beacon Insurance Company
One Beacon America Insurance Company
American Employers' Insurance Company
The Camden Fire Insurance Association
Homeland Insurance Company of New York
American Alternative Insurance Corporation
Great Lakes Reinsurance U.K. PLC
The Princeton Excess and Surplus Lines Insurance Company
Allstate Insurance Company
Boston Old Colony Insurance Company
Continental Insurance Company
Commercial Insurance Company of Newark, NJ
CNA Casualty of California
Continental Insurance Company of New Jersey

Fidelity and Casualty Company of New York
Glens Falls Insurance Company
National Ben Franklin Insurance Company of Illinois
Hiscox Dedicated Corporation Member, Ltd.
ACE American Insurance Company
ACE Capital V Ltd for itself and as representative of all subscribing underwriters for ACE Global Markets Syndicate 2488
ACE Bermuda Insurance Ltd.
ACE INA (Canada)
ACE Indemnity Insurance Company
ACE Insurance SA-NV
ACE Property & Casualty Insurance Company
Atlantic Employers Insurance Company
Bankers Standard Insurance Company
Indemnity Insurance Company of North America
Insurance Company of North America
Westchester Fire Insurance Company
Westchester Surplus Lines Insurance Company
Pacific Employers Insurance Company
Woburn Insurance Ltd.
AXA Corporate Solutions Assurance
AXA Corporate Solutions Insurance Company
AXA Corporate Solutions Assurance UK Branch
AXA Corporate Solutions Assurance (Canada)
AXA RE Asia Pacific Pte. Limited
AXA RE, AXA RE Canadian Branch
AXA RE UK Plc.
AXA Corporate Solutions Reinsurance Company
AXA Art Insurance Corporation
SPS Reassurance
AXA Re Madeira Branch

Compagnie Gererale de Reinsurance de Monte Carlo
AXA Versicherung AG
AXA Cessions
AXA Global Risks UK, Ltd.

The *Cantor Fitzgerald* and *Port Authority* Petitioners

Cantor Fitzgerald & Co.
Cantor Fitzgerald Associates, L.P.
Cantor Fitzgerald Brokerage, L.P.
Cantor Fitzgerald Europe
Cantor Fitzgerald International
Cantor Fitzgerald Partners
Cantor Fitzgerald Securities
Cantor Fitzgerald, L.P.
Cantor Index Limited
CO2c.com, LLC
eSpeed Government Securities, Inc.
eSpeed, Inc.
eSpeed Securities, Inc.
TradeSpark, L.P.
The Port Authority of New York and New Jersey
The Port Authority Trans-Hudson Corporation
WTC Retail LLC

The *WTC Properties* and *Eurobrokers* Petitioners

World Trade Center Properties LLC
1 World Trade Center LLC
2 World Trade Center LLC
4 World Trade Center LLC
5 World Trade Center LLC
Silverstein WTC Mgmt. Co. LLC
7 World Trade Company L.P.
Euro Brokers Inc.
Maxcor Financial Group Inc.
Maxcor Financial Inc.
Maxcor Financial Asset Management Inc.
Tradesoft Technologies, Inc.
Maxcor Information Inc.

Euro Brokers Ltd.
Euro Brokers Financial Services Limited
Euro Brokers Mexico, S.A. de C.V.
Euro Brokers (Switzerland) S.A.

The *New York Marine* Petitioners

New York Marine and General Insurance Company

The *Continental* Petitioners

Continental Casualty Company
Transcontinental Insurance Company
Transportation Insurance Company
Valley Forge Insurance Company
National Fire Insurance Company of Hartford
American Casualty Company of Reading, Pennsylvania

The *O'Neill* Petitioners
(on behalf of themselves and a putative class of all similarly situated persons and entities)

Estate of John P. O'Neill, Sr. on behalf of John P. O'Neill, Sr. deceased, and on behalf of decedent's heirs-at-law
John P. O'Neill, Jr.
Christine I. O'Neill
Carol O'Neill
Dorothy A. O'Neill

The *Ashton* Petitioners

KATHLEEN ASHTON, as Administrator of the Estate of Thomas Ashton, Deceased and on behalf of all survivors of Thomas Ashton;

JOSEPHINE ALGER and FREDERICK ALGER, as Co-Executors of the Estate of David D. Alger, Deceased and on behalf of all of survivors of David D. Alger;

ANGELICA ALLEN, as Administrator of the Estate of Eric Allen, Deceased and on behalf of all survivors of Eric Allen;

GEORGE ANDRUCKI and MARY ANDRUCKI, as co-Administrators of the Estate of Jean Andrucki, Deceased and on behalf of all survivors of Jean Andrucki;

ALEXANDER PAUL ARANYOS and WINIFRED ARANYOS, as co-Administrators of the Estate of Patrick Michael Aranyos, Deceased and on behalf of all survivors of Patrick Michael Aranyos;

MARGARET ARCE, as Administrator of the Estate of David Gregory Arce, Deceased and on behalf of all survivors of David Gregory Arce;

VICKIE ROSE ARESTEGUI, as Legal Representative of the Estate of Barbara Jean Arestegui, Deceased and on behalf of all survivors of Barbara Jean Arestegui;

MARGIT ARIAS, as Administrator of the Estate of Adam Peter Arias, Deceased, and on behalf of all survivors of Adam Peter Arias;

EVELYN ARON, as Executor of the Estate of Jack Charles Aron, Deceased and on behalf of all survivors of Jack Charles Aron;

NANCY BADAGLIACCA, as Administrator of the Estate of John J. Badagliacca, Deceased and on

behalf of all survivors of John J. Badagliacca;

CHRISTINA BAKSH, as Executor of the Estate of Michael S. Baksh, Deceased and on behalf of all survivors of Michael S. Baksh;

JOANNE BARBARA, as Executor of the Estate of Gerard Barbara, Deceased and on behalf of all survivors of Gerard Barbara;

DANIEL F. BARKOW, as Administrator of the Estate of Colleen Ann Barkow, Deceased and on behalf of all survivors of Colleen Ann Barkow;

NINA BARNES, as Administrator of the Estate of Durrell Pearsall, Deceased and on behalf of all survivors of Durrell Pearsall;

JEANNINE P. BARON, as Executor of the Estate of Evan J. Baron, Deceased and on behalf of all survivors of Evan J. Baron;

JANE BARTELS, as Executor of the Estate of Carlton Bartels, Deceased and on behalf of all survivors of Carlton Bartels;

KIMBERLY KAIPAKA BEAVEN, as Executor of the Estate of Alan Beaven, Deceased and on behalf of all survivors of Alan Beaven;

MICHELLE BEDIGIAN, as Administrator of the Estate of Carl Bedigian, Deceased and on behalf of all survivors of Carl Bedigian;

SUSAN BERGER, as Administrator of the Estate of Steven Howard Berger, Deceased and on behalf of all survivors of Steven Howard Berger;

MADELINE BERGIN, as Administrator of the Estate of John Bergin, Deceased and

on behalf of all survivors of John Bergin;

MIRIAM M. BIEGELEISEN, as Administrator of the Estate of Sh mmy D. Biegeleisen, Deceased and on behalf of all survivors of Shimmy D. Biegeleisen;

CHRISTINE BINI, as Administrator, of the Estate of Carl Bini, Deceased and on behalf of all survivors of Carl Bini;

NEIL B. BLASS, as Administrator of the Estate of Craig M. Blass, Deceased and on behalf of all survivors of Craig M. Blass;

KRIS A. BLOOD, as Executor of the Estate of Richard M. Blood, Deceased and on behalf of all survivors of Richard M. Blood;

DOROTHY ANN BOGDAN, as Administrator of the Estate of Nicholas Andrew Bogdan, Deceased and on behalf of all survivors of Nicholas Andrew Bogdan;

MARIA TERESA BOISSEAU, as Proposed Personal Representative of the Estate of Lawrence Boisseau, Deceased and on behalf of all survivors of Lawrence Boisseau;

TRACI BOSCO, as Administrator of the Estate of Richard Edward Bosco, Deceased and on behalf of all survivors of Richard Edward Bosco;

KATHLEEN BOX, as Administrator of the Estate of Gary R. Box, Deceased and on behalf of all survivors of Gary R. Box;

JAMES BOYLE, as Administrator of the Estate of Michael Boyle, Deceased and on behalf of all survivors of Michael Boyle;

DAVID BRACE, as Administrator of the Estate of Sandra Conaty Brace,

Deceased and on behalf of all survivors of Sandra Conaty Brace;

JENNIFER E. BRADY, as Administrator of the Estate of David B. Brady, Deceased and on behalf of all survivors of Jennifer E. Brady;

CURTIS FRED BREWER, as Executor of the Estate of Carol Keyes Demitz, Deceased and on behalf of all survivors of Carol Keyes Demitz;

HILLARY A. BRILEY, as Administrator of the Estate of Jonathan E. Briley, Deceased and on behalf of all survivors of Jonathan E. Briley;

URSULA BROGHAMMER, as Executor of the Estate of Herman C. Broghammer, Deceased and on behalf of all survivors of Herman C. Broghammer;

JoANNE BRUEHERT, as Administrator of the Estate of Richard G. Bruehert, Deceased and on behalf of all survivors of Richard G. Bruehert;

JUAN B. BRUNO, as Administrator of the Estate of Rachel Tamares, Deceased and on behalf of all survivors of Rachel Tamares;

SUSAN E. BUHSE, as Administrator of the Estate of Patrick Joseph Buhse, Deceased and on behalf of all survivors of Patrick Joseph Buhse;

ELIZABETH R. BURNS, as Administrator of the Estate of Donald J. Burns, Deceased and on behalf of all survivors of Donald J. Burns;

JAMES C. CAHILL, as Administrator of the Estate of Scott Walter Cahill, Deceased and on behalf of all survivors of Scott Walter Cahill;

JAMES W. CAHILL and KATHLEEN CAHILL, as co-Administrators of the Estate of Thomas Cahill, Deceased and on behalf of all survivors of Thomas Cahill;

DEBORAH CALDERON, as Administrator of the Estate of Edward Calderon, Deceased and on behalf of all survivors of Edward Calderon;

JANET CALIA, as Administrator of he Estate of Dominick Enrico Calia, Deceased and on behalf of all survivors of Dominick Enrico Calia;

JACQUELINE CANNIZZARO, as Administrator of the Estate of Brian Cannizzaro, Deceased and on behalf of all survivors of Brian Cannizzaro;

TONI ANN CARROLL, as Executor of the Estate of Peter J. Carroll, Deceased and on behalf of all survivors of Peter J. Carroll;

JUDITH CASORIA, as Administrator of the Estate of Thomas Anthony Casoria, Deceased and on behalf of all survivors of Thomas Anthony Casoria;

TRACY ANN TABACK CATALANO, as Executor of the Estate of Harry Taback, Deceased and on behalf of all survivors of Harry Taback;

SANTA CATARELLI, as Executor of the Estate of Richard G. Catarelli, Deceased and on behalf of all survivors of Richard G. Catarelli;

GINA CAYNE, as Administrator of the Estate of Jason Cayne, Deceased and on behalf of all survivors of Jason Cayne;

SUK TAN CHIN, as Administrator of the Estate of Robert Chin, Deceased and

on behalf of all survivors of Robert Chin;

EDWARD P. CIAFARDINI, as Administrator of the Estate of Christopher Ciafardini, Deceased and on behalf of all survivors of Christopher Ciafardini;

LISA DiLALLO CLARK, as Administrator of the Estate of Thomas R. Clark, Deceased and on behalf of all survivors of Thomas R. Clark;

YUKO CLARK, as Personal Representative of the Estate of Gregory A. Clark, Deceased and on behalf of all survivors of Gregory A. Clark;

MARYANN COLIN, as Administrator of the Estate of Robert Dana Colin, Deceased and on behalf of all survivors of Robert Dana Colin;

JULIA COLLINS, as Administrator of the Estate of Thomas J. Collins, Deceased and on behalf of all survivors of Thomas J. Collins;

PATRICIA COPPO and JOHN R. BRENNAN, as Co-Executors of the Estate of Joseph J. Coppo, Jr., Deceased and on behalf of all survivors of Joseph J. Coppo, Jr.;

PATRICIA COUGHLIN, as Personal Representative of the Estate of John Coughlin, Deceased and on behalf of all survivors of John Coughlin;

EDITH CRUZ, as Administrator of the Estate of Angela Rosario, Deceased and on behalf of all survivors of Angela Rosario;

ILDEFONSO A. CUA, as Administrator of the Estate of Grace Alegre Cua, Deceased and on behalf of all survivors of Grace Alegre Cua;

LINDA CURIA, as Executor of the Estate of Laurence Curia, Deceased and on behalf of all survivors of Laurence Curia;

DAVID EDWARD CUSHING, as Administrator of the Estate of Patricia Cushing, Deceased and on behalf of all survivors of Patricia Cushing;

LOUISA D'ANTONIO, as Administrator of the Estate of Mary D'Antonio, Deceased and on behalf of all survivors of Mary D'Antonio;

BERIL SOFIA DeFEO, as Administrator of the Estate of David DeFeo, Deceased and on behalf of all survivors of David DeFeo;

VINCENT J. DELLA BELLA, as Administrator of the Estate of Andrea Della Bella, Deceased and on behalf of all survivors of Andrea Della Bella;

MICHAEL DELOUGHERY, as Personal Representative of the Estate of Colleen Ann Deloughery, Deceased and on behalf of all survivors of Colleen Ann Deloughery;

TODD DeVITO, as Administrator of the Estate of Jerry DeVito, Deceased and on behalf of all survivors of Jerry DeVito;

MILAGROS DIAZ, as Administrator of the Estate of Lourdes Janet Galletti, Deceased and on behalf of all survivors of Lourdes Janet Galletti;

ANDY DINNOO and DHANMATEE SAM, as co-Administrators of the Estate of Rena Sam-Dinnoo, Deceased and on behalf of all survivors of Rena Sam-Dinnoo;

MARIA DiPILATO, as Administrator of the Estate of Joseph DiPilato, Deceased and on behalf of all

survivors of Joseph DiPilato;

STACEY FRAN DOLAN, as Executor of the Estate of Brendan Dolan, Deceased and on behalf of all survivors of Brendan Dolan;

JOSEPH DOWNEY, as Administrator of the Estate of Raymond M. Downey, Deceased and on behalf of all survivors of Raymond M. Downey;

JAY CHARLES DUNNE, as Personal Representative of the Estate of Christopher Joseph Dunne, Deceased and on behalf of all survivors of Christopher Josepn Dunne;

STANLEY ECKNA, as Personal Representative of the Estate of Paul Robert Eckna, Deceased and on behalf of all survivors of Paul Robert Eckna;

DENISE ESPOSITO, as Administrator of the Estate of Michael Esposito, Deceased and on behalf of all survivors of Michael Esposito;

DENNIS EULAU, as Executor (Ad Prosequendum) of the Estate of the Michele Coyle Eulau, Deceased and on behalf of all survivors of Michele Coyle Eulau;

JEANNE M. EVANS, as Personal Representative of the Estate of Robert Evans, Deceased and on behalf of all survivors of Jeanne M. Evans;

AMY FARNUM, as Personal Representative of the Estate of Douglas Jon Farnum, Deceased and on behalf of all survivors of Douglas Jon Farnum;

MARYANNE FARRELL, as Administrator of the Estate of John Farrell, Deceased and on behalf of all survivors of John Farrell;

MELISSA VAN NESS FATHA, as Administrator Ad Prosequendum of the Estate of Syed Abdul Fatha, Deceased and on behalf of all survivors of Syed Abdul Fatha;

STEVEN FEIDELBERG, as Administrator of the Estate of Peter Adam Feidelberg, Deceased and on behalf of all survivors of Peter Adam Feidelberg;

WENDY FEINBERG, as Executor of the Estate of Alan Feinberg, Deceased and on behalf of all survivors of Alan Feinberg;

CHARLENE FIORE, as Administrator of the Estate of Michael Fiore, Deceased and on behalf of all survivors of Michael Fiore;

BRIAN FLANNERY, as Personal Representative of the Estate of Christina Donovan Flannery, Deceased and on behalf of all survivors of Christina Donovan Flannery;

LORI FLETCHER, as Personal Representative of the Estate of Andre G. Fletcher, Deceased and on behalf of all survivors of Andre G. Fletcher;

CLAUDIA FLYZIK and NANCY WALSH, , as co-Administrators of the Estate of Carol Flyzik, Deceased and on behalf of all survivors of Carol Flyzik;

ROBERT T. FOLGER, as Administrator of the Estate of Jane Claire Folger, Deceased and on behalf of all survivors of Jane Claire Folger;

KURT FOSTER, as Executor of the Estate of Claudia Foster, Deceased and on behalf of all survivors of Claudia Foster;

CAROL FRANCOLINI, as Personal Representative of the Estate of Arthur

Joseph Jones, III, Deceased and on behalf of all survivors of Arthur Joseph Jones, III;

HELEN FRIEDLANDER as Executor of the Estate of Alan W. Friedlander, Deceased and on behalf of all survivors of Alan W. Friedlander;

LISA FRIEDMAN, as Administrator of the Estate of Andrew Friedman, Deceased and on behalf of all survivors of Andrew Friedman;

ANNE GABRIEL, as Executor of the Estate of Richard Gabriel, Deceased and on behalf of all survivors of Richard Gabriel;

MONICA M. GABRIELLE, as Administrator of the Estate of Richard Gabrielle, Deceased and on behalf of all survivors of Richard Gabrielle;

KRISTIN GALUSHA-WILD, as Executor of the Estate of Michael Stewart, Deceased and on behalf of all survivors of Michael Stewart;

KATHLEEN GANCI, as Executor of the Estate of Peter J. Ganci, Jr., Deceased and on behalf of all survivors of Peter J. Ganci, Jr.;

DOROTHY GARCIA, as Executor of the Estate of Andrew Garcia, Deceased and on behalf of all survivors of Andrew Garcia;

HECTOR GARCIA and CARMEN GARCIA, as co-Administrators of the Estate of Marlyn C. Garcia, Deceased and on behalf of all survivors of Marlyn C. Garcia;

ELIZABETH GARDNER, as Administrator of the Estate of Thomas Gardner, Deceased and on behalf of all survivors of Thomas Gardner;

MATHILDA GEIDEL, as Personal Representative of the Estate of Gary Geidel, Deceased and on behalf of all survivors of Gary Geidel;

DIANE GENCO, as Administrator of the Estate of Peter Genco, Deceased and on behalf of all survivors of Peter Genco;

PHILIP GERMAIN, as Proposed Administrator of the Estate of Denis Germain, Deceased and on behalf of all survivors of Denis Germain;

CAROL GIES, as Administrator of the Estate of Ronnie Gies, Deceased and on behalf of all survivors of Ronnie Gies;

JOHN J. GILL, as Administrator of the Estate of Paul John Gill, Deceased and on behalf of all survivors or Paul John Gill;

SERINA GILLIS, as Prospective Administrator of the Estate of Rodney Gillis, Deceased and on behalf of all survivors of Rodney Gillis;

ARMINE GIORGETTI, as Personal Representative of the Estate of Steven A. Giorgetti, Deceased and on behalf of all survivors of Steven A. Giorgetti;

ANGELA GITTO, as Administrator of the Estate of Salvatore Gitto, Deceased and on behalf of all survivors of Salvatore Gitto;

MEG BLOOM GLASSER, as Executor of the Estate of Thomas Glasser, Deceased and on behalf of all survivors of Thomas Glasser;

SHARON COBB-GLENN, as Administrator of the Estate of Harry Glenn, Deceased and on behalf of all

survivors of Harry Glenn;

HELENE PARISI-GNAZZO, as Administrator of the Estate of John T. Gnazzo, Deceased and on behalf of all survivors of John T. Gnazzo;

JODIE GOLDBERG, as Administrator of the Estate of Brian Goldberg, Deceased and on behalf of all survivors of Brian Goldberg;

MIA GONZALEZ, as Administrator of the Estate of Lydia Bravo, Deceased and on behalf of all survivors of Lydia Bravo;

DEBORAH GRAZIOSO, as Personal Representative of the Estate of Timothy Grazioso, Deceased and on behalf of all survivors of Timothy Grazioso;

CLAUDETTE B. GREENE, as Executor of the Estate of Donald F. Greene, Deceased and on behalf of all survivors of Donald F. Greene;

PETER GREENLEAF, as Administrator of the Estate of James Arthur Greenleaf, Deceased and on behalf of all survivors of James Arthur Greenleaf;

REGAN GRICE-VEGA, as Personal Representative of the Estate of Peter Vega, Deceased and on behalf of all survivors of Peter Vega;

JOANNE GROSS, as Administrator of the Estate of Thomas Foley, Deceased and on behalf of all survivors of Thomas Foley;

MARY HAAG, as Fiduciary of the Estate of Gary Haag, Deceased and on behalf of all survivors of Gary Haag;

GORDON G. HABERMAN, as Administrator of the Estate of Andrea Lyn Haberman, Deceased

and on behalf of all survivors of Andrea Lyn Haberman;
PATRICIA HAN, as Administrator of the Estate of Frederic K. Han, Deceased and on behalf of all survivors of Frederic K. Han;
RENE BACOTTI HANNAFIN, as Administrator of the Estate of Thomas Hannafin, Deceased and on behalf of all survivors of Thomas Hannafin;
RACHEL R. HARRELL, as Administrator of the Estate of Harvey Harrell, Deceased and on behalf of all survivors of Harvey Harrell;
ELINORE HARTZ, as Personal Representative of the Estate of John Clinton Hartz, Deceased and on behalf of all survivors of Elinore Hartz;
JENNIFER L. HARVEY, as Administrator of the Estate of Emeric Harvey, Deceased and on behalf of all survivors of Emeric Harvey;
KELLY HAYES, as Executor of the Estate of Scott J. O'Brien, Deceased and on behalf of all survivors of Scott J. O'Brien;
VIRGINIA HAYES, as Executor of the Estate of Philip Thomas Hayes, Deceased and on behalf of all survivors of Philip Thomas Hayes;
ANN R. HAYNES, as Administrator of the Estate of William Ward Haynes, Deceased and on behalf of all survivors of William Ward Haynes;
THERESA HEALEY, as Administrator of the Estate of Michael Healey, Deceased and on behalf of all survivors of Michael Healey;
SHIRLEY HENDERSON and

HASHIM A. HENDERSON, as co-Administrators of the Estate of Ronnie Lee Henderson, Deceased and on behalf of all survivors of Ronnie Lee Henderson;

KAREN HINDS, as Administrator of the Estate of Neil Hinds, Deceased and on behalf of all survivors of Neil Hinds;

DENNIS L. HOBBS and DIXIE M. HOBBS, as co-Administrators of the Estate of Tara Yvette Hobbs, Deceased and on behalf of all survivors of Tara Yvette Hobbs;

PAMELA HOHLWECK, as Administrator of the Thomas W. Hohlweck, Jr., Deceased and on behalf of all survivors of Thomas W. Hohlweck, Jr.;

KATHLEEN HOLLAND, as Administrator of the Estate of Joseph F. Holland, III, Deceased and on behalf of all survivors of Joseph F. Holland, III;

RUBINA COX-HOLLOWAY, as Administrator of the Estate of Darryl Leron McKinney, Deceased and on behalf of all survivors of Darryl Leron McKinney;

COLLEEN HOLOHAN, Administrator of the Estate of Thomas P. Holohan, Deceased and on behalf of all survivors of Thomas P. Holohan;

JOANN T. HOWARD, as Administrator of the Estate of Joseph Howard, Deceased and on behalf of all survivors of Joseph Howard;

BRIDGET HUNTER, as Administrator of the Estate of Joseph Hunter, Deceased and on behalf of all survivors of Joseph Hunter;

KATHRYN J. HUSSA, as Executor of the

Estate of Robert R. Hussa, Deceased and on behalf of all survivors of Robert R. Hussa;

YESENIA IELPI, as Administrator of the Estate of Jonathan Ielpi, Deceased and on behalf of all survivors of Jonathan Ielpi;

FREDERICK IRBY, as Administrator of the Estate of Stephanie Irby, Deceased and on behalf of all survivors of Stephanie Irby;

MARGARET P. ISKYAN, as Executor of the Estate of John Francis Iskyan, Deceased and on behalf of all survivors of John Francis Iskyan;

JENNIFER RUTH JACOBS, as Administrator of the Estate of Ariel Louis Jacobs, Deceased and on behalf of all survivors of Ariel Louis Jacobs;

KAZIMIERZ JAKUBIAK, as Personal Representative of the Estate of Maria Jakubiak, Deceased and on behalf of all survivors of Maria Jakubiak;

LEILA M. JOSEPH and WOODLY JOSEPH, as co-Administrators of the Estate of Karl Joseph, Deceased and on behalf of all survivors of Karl Joseph;

PAUL KAUFMAN, as Executor of the Estate of Scott Martin McGovern, Deceased and on behalf of all survivors of Scott Martin McGovern;

ELIZABETH H. KELLER, as Administrator of the Estate of Chandler Raymond Keller, Deceased and on behalf of all survivors of Chandler Raymond Keller;

ROBERTA KELLERMAN, as Personal Representative of the

Estate of Peter Kellerman, Deceased and on behalf of all survivors of Peter Kellerman;

PATRICIA KELLETT, as Administrator of the Estate of Joseph P. Kellett, Deceased and on behalf of all survivors of Joseph P. Kellett;

EMMET P. KELLY, as Administrator of the Estate of Thomas Richard Kelly, Deceased and on behalf of all survivors of Thomas Richard Kelly;

ROSEMARY KEMPTON, as Administrator of the Estate of Rosemary A. Smith, Deceased and on behalf of all survivors of Rosemary A. Smith;

DONALD FRANCIS KENNEDY, as Executor of the Estate of Yvonne Estelle Kennedy, Deceased and on behalf of all survivors of Yvonne Estelle Kennedy;

THERESA KING, as Administrator of the Estate of Robert King, Jr., Deceased and on behalf of all survivors of Robert King, Jr.;

VERONICA KLARES, as Executor of the Estate of Richard J. Klares, Deceased and on behalf of all survivors of Richard J. Klares;

RICHARD I. KLEIN, as Executor of the Estate of Julie Lynne Zipper, Deceased and on behalf of all survivors of Julie Lynne Zipper;

FRANCES LaFORTE, as Executor of the Estate of Michael P. LaForte, Deceased and on behalf of all survivors of Michael P. LaForte;

EDLENE C. LaFRANCE, as Administrator of the Estate of Alan Charles LaFrance, Deceased and on behalf of all survivors of Alan Charles LaFrance;

COLETTE M. LAFUENTE, as Fiduciary of the Estate of Dr. Juan M. Lafuente, Deceased and on behalf of all survivors of Dr. Juan M. Lafuente;

MORRIS D. LAMONSOFF, as Administrator of the Estate of Amy Hope Lamonsoff, Deceased and on behalf of all survivors of Amy Hope Lamonsoff;

LAURIE S. LAUTERBACH, as Personal Representative of the Estate of Carlos Cortes a/k/a Carlos Cortes-Rodriguez, Deceased and on behalf of all survivors of Carlos Cortes a/ka Carlos Cortes-Rodriguez;

ANDREA N. LeBLANC, as Administrator of the Estate of Robert G. LeBlanc, Deceased and on behalf of all survivors of Robert G. LeBlanc;

DONALD LEISTMAN, as Executor of the Estate of David R. Leistman, Deceased and on behalf of all survivors of David R. Leistman;

INGRID M. LENIHAN, as Executor of the Estate of Joseph Anthony Lenihan, Deceased and on behalf of all survivors of Joseph Anthony Lenihan;

ELAINE LEINUNG, as Administrator of the Estate of Paul Battaglia, Deceased and on behalf of all survivors of Paul Battaglia;

ROBERTA J. LEVINE, as Administrator Ad Prosequendum of the Estate of Robert M. Levine, Deceased and on behalf of all survivors of Robert M. Levine;

JERLINE LEWIS, as Personal Representative of the Estate of Sherry Ann Bordeaux, Deceased and on behalf of all

survivors of Sherry Ann Bordeaux;
JEFFREY LOVIT, as Executor of the Estate of Jacqueline Norton, Deceased and on behalf of all survivors of Jacqueline Norton;
JEFFREY LOVIT, as Executor of the Estate of Robert G. Norton, Deceased and on behalf of all survivors of Robert G. Norton;
KATHLEEN KEELER LOZIER, as Executor of the Estate of Garry W. Lozier, Deceased and on behalf of all survivors of Garry W. Lozier;
ANNE MacFARLANE, as Administrator of the Estate of Marianne MacFarlane, Deceased and on behalf of all survivors of Marianne MacFarlane;
LISANNE MacKENZIE, has been or will be appointed as Personal Representative of the Estate of James P. O'Brien, Deceased and on behalf of all survivors of James P. O'Brien;
ANDREA MAFFEO, as Administrator of the Estate of Jennieann Maffeo, Deceased and on behalf of all survivors of Jennieann Maffeo;
PAMEA ANN MAGGITTI, as Administrator for the Estate of Joseph Vincent Maggitti, Deceased and on behalf of all survivors of Joseph Vincent Maggitti;
NATALIE MAKSHANOV, as Administrator of the Estate of Jason M. Sekzer, Deceased and on behalf of all survivors of Jason M. Sekzer;
REBECCA L. MARCHAND, as Personal Representative of the Estate of Alfred G. Marchand, Deceased and on behalf of all

survivors of Alfred G. Marchand;
BETTYANN MARTINEAU, as Executor of the Estate of Brian Martineau, Deceased and on behalf of all survivors of Brian Martineau;
LORI MASCALI, as Administrator of the Estate of Joseph Mascali, Deceased and on behalf of all survivors of Joseph Mascali;
DOROTHY MAURO, as Administrator of the Estate of Charles A. Mauro, Deceased and on behalf of all survivors of Charles A. Mauro;
MERYL MAYO, as Executor of the Estate of Robert Mayo, Deceased and on behalf of all survivors of Robert Mayo;
MARGARET DONOGHUE McGINLEY, as Executor of the Estate of Daniel Francis McGinley, Deceased and on behalf of all survivors of Daniel Francis McGinley;
ILIANA McGINNIS, as Administrator of the Estate of Thomas Henry McGinnis, Deceased and on behalf of all survivors of Thomas Henry McGinnis;
CYNTHIA F. McGINTY, as Administrator of the Estate of Michael Gregory McGinty, Deceased and on behalf of all survivors of Michael Gregory McGinty;
VIRGINIA McKEON, as Personal Representative of the Estate of Barry J. McKeon, Deceased and on behalf of all survivors of Barry J. McKeon;
PATRICIA H. McDOWELL, as Administrator of the Estate of John F. McDowell, Deceased and on behalf of all survivors of John F. McDowell;

HERESA McGOVERN, as Executor of the Estate of Ann McGovern, Deceased and on behalf of all survivors of Ann McGovern;

JOANN MEEHAN, as Administrator of the Estate of Damian Meehan, Deceased and on behalf of all survivors of Damian Meehan;

OLGA MERINO, as Personal Representative of the Estate of George C. Merino, Deceased and on behalf of all survivors of George C. Merino;

FRYDERYK MILEWSKI and ANNA MILEWSKI, as co-Administrators of the Estate of Lukasz Milewski, Deceased and on behalf of all survivors of Lukasz Milewski;

AMBER MILLER and JAMIE MILLER, as co-Administrators of the Estate of Karen Juday, Deceased and on behalf of all survivors of Karen Juday;

DIANE MILLER, as Administrator of the Estate of Henry Miller, Deceased and on behalf of all survivors of Henry Miller;

FAITH MILLER, as Executor of the Estate of Robert Alan Miller, Deceased and on behalf of all survivors of Robert Alan Miller;

BARBARA MINERVINO, as Executor of the Estate of Louis J. Minervino, Deceased and on behalf of all survivors of Louis J. Minervino;

JOANNE MODAFFERI, as Administrator of the Estate of Louis Modafferi, Deceased and on behalf of all survivors of Louis Modafferi;

ANNA MOJICA, as Administrator of the Estate of Manuel Mojica, Deceased and on behalf of all

survivors of Manuel Mojica;
SARADHA MOORTHY, as Administrator of the Estate of Krishna Moorthy, Deceased and on behalf of all survivors of Krishna Moorthy;
ELIZABETH ANN MOSS, as Personal Representative of the Estate of Linda Oliva, Deceased and on behalf of all survivors of Linda Oliva;
EMILY MOTRONI, as Administrator of the Estate of Marco Motroni, Deceased and on behalf of all survivors of Marco Motroni.
LAUREN MURPHY, as Administrator of the Estate of Matthew T. O'Mahony, Deceased and on behalf of all survivors of Matthew T. O'Mahony;
ELVIRA P. MURPHY, as Administrator of the Estate of Patrick Sean Murphy, Deceased and on behalf of all survivors of Patrick Sean Murphy;
RICHARD B. NAIMAN, as Administrator of the Estate of Mildred R. Naiman, Deceased and on behalf of all survivors of Mildred R. Naiman;
EDWARD NAVARRO, as Administrator of the Estate of Karen Susan Navarro, Deceased and on behalf of all survivors of Karen Susan Navarro;
WILLIAM NELSON, as Administrator of the Estate of Theresa Risco, Deceased and on behalf of all survivors of Theresa Risco;
MERRILLY E. NOETH, as Administrator of the Estate of Michael Allen Noeth, Deceased and on behalf of all survivors of Michael Allen Noeth;
DANA NOONAN, as Administrator of the

Estate of Robert Walter Noonan, Deceased and on behalf of all survivors of Robert Walter Noonan;

WILLIAM B. NOVOTNY and MICHAEL J. NOVOTNY, as co-Administrators of the Estate of Brian C. Novotny, Deceased and on behalf of all survivors of Brian C. Novotny;

WILLIAM O'CONNOR, as Executor of the Estate of Diana O'Connor, Deceased and on behalf of all survivors of Diana O'Connor;

JAMES WALLACE O'GRADY, as Executor of the Estate of James Andrew O'Grady, Deceased and on behalf of all survivors of James Andrew O'Grady;

SHERYL J. OLIVER, as Administrator of the Estate of Edward Kraft Oliver, Deceased and on behalf of all survivors of Edward Kraft Oliver;

HARRY ONG, JR., as Legal Representative of the Estate of Betty Ann Ong, Deceased and on behalf of all survivors of Betty Ann Ong;

LISA PALAZZO, as Administrator of the Estate of Jeffrey Palazzo, Deceased and on behalf of all survivors of Jeffrey Palazzo;

DONNA PAOLILLO, as Administrator of the Estate of John Paolillo, Deceased and on behalf of all survivors of John Paolillo;

HELENE S. PASSARO, as Administrator of the Estate of Suzanne H. Passaro, Deceased and on behalf of all survivors of Suzanne H. Passaro;

MARY GOLA PEREZ, as Executor of the Estate of Anthony Perez, Deceased and on behalf of all

survivors of Anthony Perez;

LINDA PICKFORD, as Administrator of the Estate of Christopher Pickford, Deceased and on behalf of all survivors of Christopher Pickford;

NANCY PICONE, as Administrator of the Estate of Arturo Sereno, Deceased and on behalf of all survivors of Arturo Sereno;

JEAN OSLYN POWELL, as Administrator of the Estate of Shawn E. Powell, Deceased and on behalf of all survivors of Shawn E. Powell;

KAREN PRINCIOTTA, as Legal Representative of the Estate of Vincent Princiotta, Deceased and on behalf of all survivors of Vincent Princiotta;

MICHAEL PUCKETT, as Administrator of the Estate of John F. Puckett, Deceased and on behalf of all survivors of John F. Puckett;

DOMINIC J. PUOPOLO, SR., as Administrator of the Estate of Sonia Mercedes Morales Puopolo, Deceased and on behalf of all survivors of Sonia Mercedes Morales Puopolo;

PATRICIA QUIGLEY, as Executor of the Estate of Patrick Quigley, Deceased and on behalf of all survivors of Patrick Quigley;

FRANCINE RAGGIO, as Administrator of the Estate of Eugene Raggio, Deceased and on behalf of all survivors of Eugene Raggio;

DEBORAH RANCKE, as Proposed Personal Representative of the Estate of Alfred Todd Rancke, Deceased and on behalf of all survivors of Alfred Todd Rancke;

MARYANN RAND, as Administrator of the Estate of Adam David

Rand, Deceased and on behalf of all survivors of Adam David Rand;
SADIQ RASOOL, as Administrator of the Estate of Amenia Rasool, Deceased and on behalf of all survivors of Amenia Rasool;
SUSAN RASWEILER, as Administrator of the Estate of Roger Rasweiler, Deceased and on behalf of all survivors of Roger Rasweiler;
CATHERINE T. REGENHARD, as Administrator of the Estate of Christian Michael Regenhard, Deceased and on behalf of all survivors of Christian Michael Regenhard;
ELIZABETH REGO, as Administrator of the Estate of Leah E. Oliver, Deceased and on behalf of all survivors of Leah E. Oliver;
WILLIAM D. ROBBINS, as Personal Representative of the Estate of Clarin Schwartz, Deceased and on behalf of all survivors of Clarin Schwartz;
EVELYN RODRIGUEZ, as Administrator of the Estate of Anthony Rodriguez, Deceased and on behalf of all survivors of Anthony Rodriguez;
MARTIN ROSENBAUM, as Administrator of the Estate of Brooke David Rosenbaum, Deceased and on behalf of all survivors of Brooke David Rosenbaum;
GLENNA M. ROSENBERG, as Administrator of the Estate of Lloyd Daniel Rosenberg, Deceased and on behalf of all survivors of Lloyd Daniel Rosenberg;
JILL ROSENBLUM, as Executor of the Estate of Andrew I. Rosenblum, Deceased and on behalf of all

survivors of Andrew I. Rosenblum;

JUDI A. ROSS, as Executor of the Estate of Richard Ross, Deceased and on behalf of all survivors of Richard Ross;

CLAUDIA RUGGIERE, as Administrator of the Estate of Bart Joseph Ruggiere, Deceased and on behalf of all survivors of Bart Joseph Ruggiere;

GILBERT RUIZ, JR., as Administrator of the Estate of Gilbert Ruiz, Deceased and on behalf of all survivors of Gilbert Ruiz;

ANDREA RUSSIN, as Administrator of the Estate of Steven Russin, Deceased and on behalf of all survivors of Steven Russin;

DIANE RYAN, as Administrator of the Estate of Edward Ryan, Deceased and on behalf of all survivors of Edward Ryan;

MARGARET RYAN, as (Ad Prosequendum) of the Estate of Matthew Ryan, Deceased and on behalf of all survivors of Matthew Ryan;

DELPHINE SAADA, as Administrator of the Estate of Thierry Saada, Deceased and on behalf of all survivors of Thierry Saada;

PEDRO SALAME, as Administrator, and MARY LYNN SANTOS, Individually, of the Estate of Carmen Milly Rodriguez, Deceased and on behalf of all survivors of Carmen Milly Rodriguez;

BARBARA SCARAMUZZINO, as Administrator of the Estate of Nicholas Rossomando, Deceased and on behalf of all survivors of Nicholas Rossomando;

JANLYN SCAUSO, as Administrator of the Estate of Dennis P. Scauso, Deceased and on behalf of all survivors of Dennis P. Scauso;

PHYLLIS SCHREIER, as Administrator of the Estate of Jeffrey H. Schreier, Deceased and on behalf of all survivors of Jeffrey H. Schreier;

NANCY SHEA, as Personal Representative of the Estate of Joseph P. Shea, Deceased and on behalf of all survivors of Joseph P Shea;

MAUREEN SHERRY, as Administrator of the Estate of John Anthony Sherry, Deceased and on behalf of all survivors of John Anthony Sherry;

LORI SHULMAN, as Executor of the Estate of Mark Shulman, Deceased and on behalf of all survivors of Mark Shulman;

HOLLI SILVER, as Personal Representative of the Estate of David Scott Silver, Deceased and on behalf of all survivors of David Scott Silver;

EILEEN SIMON, as Executor of the Estate of Michael J. Simon, Deceased and on behalf of all survivors of Michael J. Simon;

DHANRAJ SINGH, as Administrator of the Estate of Khamladai K. Singh, Deceased and on behalf of all survivors of Khamladai K. Singh;

MARK J. SISKOPOULOS, as Administrator of the Estate of Muriel F. Siskopoulos, Deceased and on behalf of all survivors of Muriel F. Siskopoulos;

DONNA SMITH, as Executor of the Estate of James Gregory Smith, Deceased and on behalf of all survivors

of James Gregory Smith;

BARBARA SOHAN, as Administrator of the Estate of Astrid Elizabeth Sohan, Deceased and on behalf of all survivors of Astrid Elizabeth Sohan;

ROBERT SPADAFORA, ESQ., as Executor of the Estates of Mary B. Trentini and James A. Trentini, Deceased and on behalf of all survivors of Mary B. Trentini and James A. Trentini;

LAURIE SPAMPINATO, as Administrator of the Estate of Donald Spampinato, Deceased and on behalf of all survivors of Donald Spampinato;

THERESA A. STACK, as Administrator (Ad Prosequendum) of the Estate of Lawrence T. Stack, Deceased and on behalf of all survivors of Lawrence T. Stack;

GREGORY STEVENS, as Executor of the Estate of Lisa Terry, Deceased and on behalf of all survivors of Lisa Terry;

EDWARD J. SWEENEY, Administrator of the Estate of Brian E. Sweeney, Deceased and on behalf of all survivors of Brian E. Sweeney;

EILEEN TALLON, as Fiduciary of the Estate of Sean Patrick Tallon, Deceased and on behalf of all survivors of Sean Patrick Tallon;

PATRICIA TARASIEWICZ, as Administrator of the Estate of Allan Tarasiewicz, Deceased and on behalf of all survivors of Allan Tarasiewicz;

EVELYN TEPEDINO, as Administrator of the Estate of Jody Nichilo, Deceased and on behalf of all survivors of Jody Nichilo;

RAJ THACKURDEEN & SAT THACKURDEEN, as co-Administrators of the Estate of Goumatie Thackurdeen, Deceased and on behalf of all survivors of Goumatie Thackurdeen;

ROBIN THEURKAUF, Personal Representative of the Estate of Thomas F. Theurkauf, Jr., Deceased and on behalf of all survivors of Thomas F. Theurkauf, Jr.;

ROSANA THOMPSON, as Administrator of the Estate of Nigel Bruce Thompson, Deceased and on behalf of all survivors of Nigel Bruce Thompson;

JOSEPH A. TIESI, as Personal Representative of the Estate of Mary Ellen Tiesi, Deceased and on behalf of all survivors of Mary Ellen Tiesi;

KIMBERLY TRIMINGHAM-AIKEN, as Administrator of the Estate of Terrance Aiken, Deceased and on behalf of all survivors of Terrance Aiken;

MARIE TWOMEY, as Administrator of the Estate of Robert T. Twomey, Deceased and on behalf of all survivors of Robert T. Twomey;

VICTOR UGOLYN, as Administrator of the Estate of Tyler V. Ugolyn, Deceased and on behalf of all survivors of Tyler V. Ugolyn;

FELICIANA UMANZOR, as Administrator of the Estate of Elsy C. Osoria, Deceased and on behalf of all survivors of Elsy C. Osoria;

VIRGINIA LORENE ROSSITER VALVO, as Administrator of the Estate of Carlton F. Valvo, II, Deceased and on behalf of all

survivors of Carlton F. Valvo, II;

JASMINE VICTORIA and DAWN TORRES BROWN, as co-Administrators of the Estate of Celeste Torres Victoria, Deceased and on behalf of all survivors of Celeste Torres Victoria;

RICHARD VILLA, as Administrator of the Estate of Sharon Christina Milan, Deceased and on behalf of all survivors of Sharon Christina Milan;

ANTHONY VINCELLI, as Administrator of the Estate of Chantal Vincelli, Deceased and on behalf of all survivors of Chantal Vincelli;

LUCY VIRGILIO, as Administrator of the Estate of Lawrence J. Virgilio, Deceased and on behalf of all survivors of Lawrence J. Virgilio;

BENHARDT R. WAINIO, as Personal Representative of the Estate of Honor Elizabeth Wainio, Deceased and on behalf of all survivors of Honor Elizabeth Wainio;

DIANE WALL, as Executor of the Estate of Glen J. Wall, Deceased and on behalf of all survivors of Glen J. Wall;

DIANNE M. WALSH, as Administrator of the Estate of Christine J. Barbuto, Deceased and on behalf of all survivors of Christine J. Barbuto;

AMY L. WEAVER, as Administrator of the Estate of Todd Christopher Weaver, Deceased and on behalf of all survivors of Todd Christopher Weaver;

DELIA WELTY, as Administrator of the Estate of Timothy Matthew Welty, Deceased and on behalf of all survivors

of Timothy Matthew Welty;
LENA WHITTAKER, as Administrator of the Estate of Karen E. Hagerty, Deceased and on behalf of all survivors of Karen E. Hagerty;
PATRICIA WISWALL, as Executor of the Estate of David Wiswall, Deceased and on behalf of all survivors of David Wiswall;
ANNE M. WODENSHEK, as Administrator of the Estate of Christopher W. Wodenshek, Deceased and on behalf of all survivors of Christopher W. Wodenshek;
CELLA WOO-YUEN, as Administrator of the Estate of Elkin Yuen, Deceased and on behalf of all survivors of Elkin Yuen;
SIEW-SIM YEOW, as Administrator of the Estate of Michael Waye, Deceased and on behalf of all survivors of Michael Waye;
MADELEINE A. ZUCCALA, as Personal Representative of the Estate of Joseph J. Zuccala, Deceased and on behalf of all survivors of Joseph J. Zuccala;
ERICA ZUCKER, as Executor of the Estate of Andrew Zucker, Deceased and on behalf of all survivors of Andrew Zucker;
NANCY LYNN ZUCKERMAN, as Administrator of the Estate of Alan Jay Lederman, Deceased and on behalf of all survivors of Alan Jay Lederman;
Aldo Adissi;
Edward Arancio and Kathleen M. Arancio;
Leonard Ardizzone and Barbara Ardizzone;
Thomas Baez;
Joseph Beltrani;
Andrew Braun;
Andrzej Cieslik;
James Cizike ;
Thomas Conroy, Jr.;

Gibson A. Craig;
Bradley Daly;
Domenick Damiano ;
Robert J. D'Elia;
Thomas Donnelly;
Charles Downey;
Joseph R. Downey;
Timothy L. Frolich And
Irene Frolich;
Steven M. Gillespie;
Joseph Hands;
John Hassett;
Warren Hayes;
James D. Hodges, II;
Netta Issacof;
Arnold Lederman And
Phyllis Lederman;
Michael J. Lindy;
Sandy Amrita
Mahabir;
William Martin;
Kevin McArdle;
James McGetrick;
Owen McGovern;
Warren Monroe;
Kevin Mount;
Kevin G. Murphy;
Janice O'dell;
Timothy Parker;
Kevin Quinn;
Howard Rice;
Louis Schaefer;
Charles Schmid;
Scott Schrimpe;
Richard Ting;
George Luis Torres;
Robert V. Trivigno;
Russell J. Vomero;
Edward Walsh;
Philip J. Zeiss;
EMILY AMARANTO,
as Administrator of
the Estate of Angelo
Amaranto, Deceased
and on behalf of all
survivors of Angelo
Amaranto;
LORI ANN
ARCZYNSKI, as
Executor of the
Estate of Michael G.
Arczynski, Deceased
and on behalf of all
survivors of Michael
G. Arczynski;
LOUANNE BAILY, as
Administrator of the
Estate of Brian Paul
Dale, Deceased and
on behalf of all
survivors of Brian
Paul Dale;
MONICA BARBELLA,
as Administrator of
the Estate of James
Barbella, Deceased
and on behalf of all
survivors of James
Barbella;
MARCEL BIRNBAUM,
as Personal
Administrator of the
Estate of Joshua
Birnbaum, Deceased

and on behalf of all survivors of Joshua Birnbaum;

SHARON BOOKER, as Administrator of the Estate of SEAN BOOKER, Deceased and on behalf of all survivors of Sean Booker;

FREDERICK BOWERS, JR., as Administrator of the Estate of Kimberly S. Bowers, Deceased and on behalf of all survivors of Kimberly S. Bowers;

JEAN BRACA, as Administrator of the Estate of Alfred J. Braca, Deceased and on behalf of all survivors of Alfred J. Braca;

RODNEY CALLUM, as Administrator of the Estate of Michell Robotham, Deceased and on behalf of all survivors of Michell Robotham;

NANCY E. CARROLL, as Administrator of the Estate of Michael T. Carroll, Deceased and on behalf of all survivors of Michael T. Carroll;

DAVID J. CHAZIN, as Administrator of the Estate of Ruth Lapin, Deceased and on behalf of all survivors of Ruth Lapin;

MARIANNE CRUIKSHANK, as Administrator of the Estate of Robert L. Cruikshank, Deceased and on behalf of all survivors of Robert L. Cruikshank;

TANYA KIM DAVIS, as Administrator of the Estate of Mannie Leroy Clark, Deceased and on behalf of all survivors of Mannie Leroy Clark;

JOAN E. DINCUFF and FRANK DINCUFF, as co-Administrators of the Estate of Christopher M. Dincuff, Deceased, and on behalf of all survivors of Christopher M. Dincuff;

NGORAN DJE, as Administrator of the

Estate of Irina Buslo, Deceased and on behalf of all survivors of Irina Buslo;

SAM ELLIS, as Representative of the Estate of Valerie Silver Ellis, Deceased and on behalf of all survivors of Valerie Silver Ellis;

EILEEN ERWIN, as Representative of the Estate of William John Erwin, Deceased and on behalf of all survivors of William John Erwin;

MARY L. FERGUSON, as Executor of the Estate of George J. Ferguson, Deceased and on behalf of all survivors of George J. Ferguson;

TIERNEY FRAWLEY, as Administrator of the Estate of Kevin Frawley, Deceased and on behalf of all survivors of Kevin Frawley;

LARRY GIUGLIANO, as Administrator of the Estate of Cynthia Giugliano, Deceased and on behalf of all survivors of Cynthia Giugliano;

MARY JO GRILLO, as Administrator of the Estate of Joseph Grillo, Deceased and on behalf of all survivors of Joseph Grillo;

DIGNA HERNANDEZ, as Administrator of the Estate of Raul Hernandez, Deceased and on behalf of all survivors of Raul Hernandez;

KATHERINE M. HOORN and DENNIS J. HOORN, as Administrators of the Estate of Bradley Hoorn, Deceased and on behalf of all survivors of Bradley Hoorn;

JOSEPH WALTER HROMADA, as Administrator of the Estate of Milagros Hromada, Deceased and on behalf of all survivors of Milagros Hromada;

KAREN R. HUGHES, as Administrator of the Estate of Timothy

Hughes, Deceased and on behalf of all survivors of Timothy Hughes;

YELENA ILKANAYEV, as Personal Representative of the Estate of Daniel Ilkanayev, Deceased and on behalf of all survivors of Daniel Ilkanayev;

EMILY LIZCANO, as Administrator of the Estate of Harold Lizcano, Deceased and on behalf of all survivors of Harold Lizcano;

JEANNE McALARY, as Administrator of the Estate of James J. McAlary, Deceased and on behalf of all survivors of James J. McAlary;

ANN McCARTHY, as Administrator of the Estate of Robert Garvin McCarthy, Deceased and on behalf of all survivors of Robert Garvin McCarthy;

DEBRA McSWEENEY, as Administrator of the Estate of Timothy McSweeney, Deceased and on behalf of all survivors of Timothy McSweeney;

LLOYD C. MAIR, as Personal Representative of the Estate of Linda Catherine Mair Grayling, Deceased and on behalf of all survivors of Linda Catherine Mair Grayling;

MARY JEAN McCARTHY O'LEARY, as Administrator of the Estate of Gerald Thomas O'Leary, Deceased, and on behalf of all survivors of Gerald Thomas O'Leary;

DEBORAH OPPERMAN, as Administrator of the Estate of Michael Opperman, Deceased and on behalf of all survivors of Deborah Opperman;

PERRY S. ORETZKY, as Personal Representative of the

Estates of David L. Angell and Lynn E. Angell, Deceased and on behalf of all survivors of David L. Angell and Lynn E. Angell;

KANTILAL PATEL, as Representative of the Estate of Manish Patel, Deceased and on behalf of all survivors of Manish Patel;

NICOLE REDA, as Administrator of the Estate of Gregory Reda, Deceased and on behalf of all survivors of Gregory Reda;

NILSA RIVERA, as Executrix of the Estate of Isaias Rivera, Deceased and on behalf of all survivors of Isaias Rivera;

RICKY VIDER RIVERS, as Administrator of the Estate of David E. Rivers, Deceased and on behalf of all survivors of David E. Rivers;

EILEEN A. SHANAHAN, as Administrator of the Estate of Earl R. Shanahan, Deceased and on behalf of all survivors of Earl R. Shanahan;

SAMANTHA TAYLOR, as Legal Representative of the Estate of Sandra Carol Taylor, Deceased and on behalf of all survivors of Sandra Carol Taylor;

BARBARA TIRADO, as Administrator of the Estate of David L. Tirado, Deceased and on behalf of all survivors of David L. Tirado;

ANNE VANDEVANDER, as Administrator of the Estate of Jon Vandevander, Deceased and on behalf of all survivors of Jon Vandevander;

REMA WAISER, as Administrator of the Estate of SIMON V. WEISER, Deceased and on behalf of all

survivors of Simon V. Weiser;
JANICE C. WILLIAMS, as Administrator of the Estate of Louis Calvin Williams, III, Deceased and on behalf of all survivors of Louis Calvin Williams, III;
DEBBIE WILLIAMS, as Administrator of the Estate of Pauline Francis, Deceased and on behalf of all survivors of Pauline Francis;
John Citarella;
Douglas F. Copp;
Brian Rocovich;
Steve Sullivan;
William Walsh;
EDELMIRO ABAD, as Personal Representative of the Estate of Lorraine Abad, Deceased and on behalf of all survivors of Lorraine Abad;
MARY ELIZABETH ADDERLEY and TERENCE E. ADDERLEY, as Co-Administrators of the Estate of Terence E. Adderley, Jr., Deceased and on behalf of all survivors of Terence E. Adderley, Jr.;
CARMEN AGNES, as Personal Representative of the Estate of David S. Agnes, Deceased and on behalf of all survivors of David S. Agnes;
MILTIADIS AHLADIOTIS, as Personal Representative of the Estate of Joanne Maria Ahladiotis, Deceased and on behalf of all survivors of Joanne Maria Ahladiotis;
DONNA ALBERT, as Executor of the Estate of Jon Albert, Deceased and on behalf of all survivors of Jon Albert;
JOSEPH BERARDI, as Personal Representative of the Estate of Dominick J. Berardi, Deceased and on behalf of all survivors of Dominick J. Berardi;

VALERIE BETHKE, as Legal Representative of the Estate of William R. Bethke, Deceased and on behalf of all survivors of William R. Bethke;

DEBORAH BLANDING, as Administrator of the Estate of Harry A. Blanding, Deceased and on behalf of all survivors of Harry A. Blanding;

GAIL BRENNAN, as Administrator of the Estate of Edward A. Brennan, Deceased and on behalf of all survivors of Edward A. Brennan;

DAWN BRYFOGLE, as Administrator of the Estate of Mark Bruce, Deceased and on behalf of all survivors of Mark Bruce;

JULIE BURKE, as Administrator of the Estate of Thomas Daniel Burke, Deceased and on behalf of all survivors of Thomas Daniel Burke;

MARTHA C. BUTLER, as Administrator of the Estate of Thomas M. Butler, Deceased and on behalf of all survivors of Thomas M. Butler;

SHARON CAHILL, as Executor of the Estate of John B. Cahill, Deceased and on behalf of all survivors of John B. Cahill;

SUSAN CALCAGNO, as Personal Representative of the Estate of Philip V. Calcagno, Deceased and on behalf of all survivors of Philip V. Calcagno;

MICHELLE and VINCENT CANGELOSI, as Personal Representatives of the Estate of Vincent A. Cangelosi, Deceased and on behalf of all survivors of Vincent A. Cangelosi;

LORI CAPORICCI, as Personal Representative of the Estate of Louis

Caporicci, Deceased and on behalf of all survivors of Louis Caporicci;

JEAN CAREY, as Administrator of the Estate of Dennis M. Carey, Deceased and on behalf of all survivors of Dennis M. Carey;

CATHY CARILLI-SINTON, as Administrator of the Estate of Thomas E. Sinton, III, Deceased and on behalf of all survivors of Thomas E. Sinton;

PATRICIA CARRINGTON, as Administrator of the Estate of Jeremy Carrington, Deceased and on behalf of all survivors of Jeremy Carrington;

LEONARD A. CASTRIANNO, as Administrator of the Estate of Leonard M. Castrianno, Deceased and on behalf of all survivors of Leonard M. Castrianno;

GERALDINE CEFALU, as Administrator of the Estate of Jason Cefalu, Deceased and on behalf of all survivors of Jason Cefalu;

BOB CHEATHAM, as Personal Representative of the Estate of Delrose Cheatham, Deceased and on behalf of all survivors of Delrose Cheatham;

JOHN FRANCIS CLARKE, as Personal Representative of the Estate of Michael J. Clarke, Deceased and on behalf of all survivors of Michael J. Clarke;

ROBERT CLARK, as Personal Representative of the Estate of Eugene Clark, Deceased and on behalf of all survivors of Eugene Clark;

CHARLES CLYNE, as Personal Representative of the Estate of Susan M. Clyne, Deceased and on behalf of all

survivors of Susan M. Clyne;

VINCENT J. COAKLEY and CAROLINE COAKLEY, as Administrators of the Estate of Steven Coakley, Deceased and on behalf of all survivors of Steven Coakley;

FELICIA A. CORBETT, as Personal Representative of the Estate of Joseph A. Corbett, Deceased and on behalf of all survivors of Joseph A. Corbett;

PAULA COTTOY, as Administrator of the Estate of Conrod Cottoy, Sr., Deceased and on behalf of all survivors of Conrod Cottoy, Sr.;

MARIANN COYLE, as Personal Representative of the Estate of Andrew Gilbert, Deceased and on behalf of all survivors of Andrew Gilbert;

JOHN CRANT, as Administrator of the Estate of Denise Crant, Deceased and on behalf of all survivors of Denise Crant;

LISA B. CRAWFORD, as Personal Representative of the Estate of James L. Crawford, Jr., Deceased and on behalf of all survivors of James L. Crawford;

MARIA CRIFASI, as Administrator of the Estate of Lucy Crifasi, Deceased and on behalf of all survivors of Luch Crifasi;

JOANN CROSS, as Administrator of the Estate of Dennis Cross, Deceased and on behalf of all survivors of Dennis Cross;

MARIA CRUZ, as Personal Representative of the Estate of Eduvigis Reyes, Jr., Deceased and on behalf of all survivors of Eduvigis Reyes, Jr.;

FREDERICK CURRY, as Personal Representative of the Estate of Beverly Crew Curry, Deceased and on behalf of all survivors of Beverly Crew Curry;
PATRICIA DeANGELIS, as Administrator of the Estate of Thomas DeAngelis, Deceased and on behalf of all survivors of Thomas DeAngelis;
MARION S. DeBLASE, as Personal Representative of the Estate of James V. DeBlase, Jr., Deceased and on behalf of all survivors of James V. DeBlase, Jr.;
VIOLETTA a/k/a VIVI DEMAS, as Personal Representative of the Estate of Anthony Demas, Deceased and on behalf of all survivors of Anthony Demas;
BROOKE DEMING, as Personal Representative of the Estate of Francis X. Deming, Deceased and on behalf of all survivors of Francis X. Deming;
CHRISTEL DeSIMONE, as Personal Representative of the Estate of Christian DeSimone, Deceased and on behalf of all survivors of Christian DeSimone;
ROBERT P. DEVITT, SR., as Administrator of the Estate of Robert Devitt, Jr., Deceased and on behalf of all survivors of Robert Devitt, Jr.;
DONNA DiAGOSTINO, as Personal Representative of the Estate of Michael L. DiAgostino, Deceased and on behalf of all survivors of Michael L. DiAgostino;
DAVID A. DiSTEFANO, as Personal Representative of the Estate of Douglas F. DiStefano, Deceased and on behalf of all

survivors of Douglas F. DiStefano;
DAVID EGAN, as Personal Representative of the Estate of Lisa Egan, Deceased and on behalf of all survivors of Lisa Egan;
DAVID EGAN, as Personal Representative of the Estate of Samantha Egan, Deceased and on behalf of all survivors of Samantha Egan;
GAIL EAGLESON, as Administrator of the Estate of John Bruce Eagleson, Deceased and on behalf of all survivors of John Bruce Eagleson;
LUIS ESPINOZA, as Personal Representative of the Estate of Fanny Espinoza, Deceased and on behalf of all survivors of Fanny Espinoza;
LAURA FALLON, as Executor of the Estate of William L. Fallon, Jr., Deceased and on behalf of all survivors of William L. Fallon, Jr.;
PATRICIA FALLONE, as Personal Representative of the Estate of Anthony J. Fallone, Deceased and on behalf of all survivors of Anthony J. Fallone;
MAUREEN FANNING, as Administrator of the Estate of John Fanning, Deceased and on behalf of all survivors of John Fanning;
JEANINE LONG FRAZIER, as Administrator of the Estate of Clyde Frazier, Jr., Deceased and on behalf of all survivors of Clyde Frazier, Jr.;
ROBIN A. FREUND, as Fiduciary of the Estate of Peter L. Freund, Deceased and on behalf of all survivors of Peter L. Freund;
KENNETH R. FRIED, as Administrator of the Estate of Arlene E. Fried, Deceased

and on behalf of all survivors of Arlene E. Fried;
MEREDITH FRY, as Executor of the Estate of Peter C. Fry, Deceased and on behalf of all survivors of Peter C. Fry;
FRANCINE GALLAGHER, as Administrator of the Estate of John Patrick Gallagher, Deceased and on behalf of all survivors of John Patrick Gallagher;
CANDY GLAZER, as Administrator of the Estate of Edmund Glazer, deceased and on behalf of all survivors of Edmund Glazer;
ANTONIA GARGANO, as Personal Representative of the Estate of Rocco Nino Gargano, Deceased and on behalf of all survivors of Rocco Nino Gargano;
JILL GARTENBERG, as Administrator of the Estate of James M. Gartenberg, Deceased and on behalf of all survivors of James M. Gartenberg;
MICHELLE GELINAS, as Personal Representative of the Estate of Peter Gelinas, Deceased and on behalf of all survivors of Peter Gelinas;
DEBRA GELLER, as Administrator of the Estate of Steven Paul Geller, Deceased and on behalf of all survivors of Steven Paul Geller;
SONDRA GIACCONE, as Personal Representative of the Estate of Joseph Giaccone, Deceased and on behalf of all survivors of Joseph Giaccone;
LACHANZE GOODING, as Personal Representative of the Estate of Calvin Joseph Gooding, Deceased and on behalf of all survivors

of Calvin Joseph Gooding;
ROXANNE GREEN, as Administrator of the Estate of Wade Green, Deceased and on behalf of all survivors of Wade Green;
SUSAN MALLERY GURIAN, as Personal Representative of the Estate of Douglas Brian Gurian, Deceased and on behalf of all survivors of Douglas Brian Gurian;
THOMAS HANNON, as Personal Representative of the Estate of Dana R. Hannon, Deceased and on behalf of all survivors of Dana R. Hannon;
CAROL HARAN, as Personal Representative of the Estate of James Haran, Deceased and on behalf of all survivors of James Haran;
SHEILA G. HARRIS, as Executor of the Estate of Stewart D. Harris, Deceased and on behalf of all survivors of Stewart D. Harris;
WANDA HERNANDEZ, as Administrator of the Estate of Monique DeJesus, Deceased and on behalf of all survivors of Monique DeJesus;
ALLISON HOBBS, as Personal Representative of the Estate of Thomas A. Hobbs, Deceased and on behalf of all survivors of Thomas A. Hobbs;
JAMES S. HOFFMAN, as Personal Representative of the Estate of Marcia Hoffman, Deceased and on behalf of all survivors of Marcia Hoffman;
ROSEMARIE HOHMANN, as Executor of the Estate of Jonathan R. Hohmann, Deceased and on behalf of all survivors of Jonathan R. Hohmann;

CHRISTOPHER HOWARD, as Administrator of the Estate of George Howard, Deceased and on behalf of all survivors of George Howard;

BARRY JABLONSKI, as Administrator of the Estate of Virginia Jablonski, Deceased and on behalf of all survivors of Virginia Jablonski;

ROBERT B. JACKMAN, as Personal Representative of the Estate of Brooke Alexandra Jackman, Deceased and on behalf of all survivors of Brooke Alexandra Jackman;

JU-HSIU JIAN, as Administrator of the Estate of Hweidar Jian, Deceased and on behalf of all survivors of Hweidar Jian;

JAN L. KANDELL, as Personal Representative of the Estate of Shari Kandell, Deceased and on behalf of all survivors of Shari Kandell;

GEORGE KATSIMATIDES, as Personal Representative of the Estate of John Katsimatides, Deceased and on behalf of all survivors of John Katsimatides;

JUDITH KEANE, as Personal Representative of the Estate of Richard Keane, Deceased and on behalf of all survivors of Richard Keane;

JULIE E. KELLY, as Personal Representative of the Estate of Timothy C. Kelly, Deceased and on behalf of all survivors of Timothy C. Kelly;

SUSAN KELLY, as Personal Representative of the Estate of Joseph Anthony Kelly, Deceased and on behalf of all survivors of Joseph Anthony Kelly;

PAUL KIEFER, as Personal Representative of the Estate of Brian Warner, Deceased and on behalf of all survivors of Brian Warner;
DONNA KLITZMAN & SUSAN KLITZMAN, as Personal Representatives of the Estate of Karen Klitzman, Deceased and on behalf of all survivors of Karen Klitzman;
HARLENE LARRY, as Administrator of the Estate of Hamidou Larry, Deceased and on behalf of all survivors of Hamidou Larry;
ANN LEAVY, as Personal Representative of the Estate of Neil Leavy, Deceased and on behalf of all survivors of Neil Leavy;
KAREN LEE, as Personal Representative of the Estate of Richard Yun-Choon Lee, Deceased and on behalf of all survivors of Richard Yun-Choon Lee;
DELORES LEGREE, as Personal Representative of the Estate of Anthony Hawkins, Deceased and on behalf of all survivors of Delores Legree;
MARIA LEGRO, as Personal Representative of the Estate of Adriana Legro, Deceased and on behalf of all survivors of Adriana Legro;
SUSAN LENOIR, as Executor of the Estate of John Robinson Lenoir, Deceased and on behalf of all survivors of John Robinson Lenoir;
CHRISTINE E. LeVEEN, as Personal Representative of the Estate of Jeffrey E. LeVeen, Deceased and on behalf of all survivors of Jeffrey E. LeVeen;
MARIE LUKAS, as Personal

Representative of the Estate of Marie Lukas, Deceased and on behalf of all survivors of Marie Lukas;

MICHELLE LUNDEN, as Administrator of the Estate of Michael Patrick Lunden, Deceased and on behalf of all survivors of Michael Patrick Lunden;

LORRAINE MARCHESE, as Personal Representative of the Estate of Laura A. Giglio a/k/a Laura Marchese, Deceased, and on behalf of all survivors of Laura A. Giglio a/k/a Laura Marchese;

JUAN MARTINEZ, as Personal Representative of the Estate of Waleska Martinez, Deceased and on behalf of all survivors of Waleska Martinez;

PEARL MAYNARD, as Representative of the Estate of Keithroy Maynard, Deceased and on behalf of all survivors of Keithroy Maynard;

BETTY ANN McCARTHY, as Personal Representative of the Estate of Justin McCarthy, Deceased and on behalf of all survivors of Justin McCarthy;

WILLIAM McCARTHY, as Personal Representative of the Estate of Michael McCarthy, Deceased and on behalf of all survivors of Michael McCarthy;

SUSAN McDERMOTT, as Personal Representative of the Estate of Matthew J. McDermott, Deceased and on behalf of all survivors of Matthew J. McDermott;

MARY BETH McERLEAN, as Personal Representative of the Estate of John T. McErlean, Jr., Deceased and on behalf of all survivors

of John T. McErlean, Jr.;
MARY S. McGOVERN, as Administrator of the Estate of William McGovern, Deceased and on behalf of all survivors of William McGovern;
GEORGE McLAUGHLIN, as Personal Representative of the Estate of George McLaughlin III, Deceased and on behalf of all survivors of George McLaughlin III;
ANNE McNEIL, as Executor of the Estate of Martin Michelstein, Deceased and on behalf of all survivors of Martin Michelstein;
KOULA MERKOURIS, as Administrator of the Estate of George Merkouris, Deceased and on behalf of all survivors of George Merkouris;
DIANE MONAHAN, as Personal Representative of the Estate of John Monahan, Deceased and on behalf of all survivors of John Monahan;
ROBERTA MORELL, as Personal Representative of the Estate of George Morell, Deceased and on behalf of all survivors of George Morell;
NANCY MORONEY, as Administrator of the Estate of Dennis Moroney, Deceased and on behalf of all survivors of Dennis Moroney;
LORRAINE MOSICAL, as Personal Representative of the Estate of William Mosical, Deceased and on behalf of all survivors of William Mosical;
ELIZABETH MURPHY, as Personal Representative of the Estate of Charles A. Murphy, Deceased and on behalf of all

survivors of Charles A. Murphy;

JUDITH BRAM MURPHY, as Personal Representative of the Estate of Brian Murphy, Deceased and on behalf of all survivors of Brian Murphy;

GAIL MYHRE, as Personal Representative of the Estate of Richard Todd Myhre, Deceased and on behalf of all survivors of Richard Todd Myhre;

ENRICA NACCAROTO, as Personal Representative of the Estate of Lorraine Lisi, Deceased and on behalf of all survivors of Lorraine Lisi;

DAVID DWIGHT NELSON and SHARON BAKER-GUAL, as co-Personal Representatives of the Estate of Kerene Gordon, Deceased and on behalf of all survivors of Kerene Gordon;

MANUELA OCTAVIA NITA-GALLO, as Administrator of the Estate of Cono Gallo, Deceased and on behalf of all survivors of Cono Gallo;

ARLINE NUSSBAUM, as Personal Representative of the Estate of Jeffrey Nussbaum, Deceased and on behalf of all survivors of Jeffrey Nussbaum;

DENNIS O'CONNOR, as Administrator of the Estate of Dennis O'Connor, Jr., Deceased and on behalf of all survivors of Dennis O'Connor, Jr.;

LYNNE O'CONNOR, as Personal Representative of the Estate of Richard O'Connor, Deceased and on behalf of all survivors of Richard O'Connor;

JOSEPH O'KEEFE, as Administrator of the Estate of Lesley Thomas, Deceased

and on behalf of all survivors of Lesley Thomas;

HOLLY D. O'NEILL, as Administrator of the Estate of Sean Gordon O'Neill, Deceased and on behalf of all survivors of Sean Gordon O'Neill;

SHEILA MARIE G. ORNEDO, as Representative of the Estate of Ruben S. Ornedo, Deceased and on behalf of all survivors of Ruben S. Ornedo;

TRACY ORR, as Administrator of the Estate of Alexander Steinman, Deceased and on behalf of all survivors of Alexander Steinman;

JOANNA OSTROWSKI, as Administrator of the Estate of James Robert Ostrowski, Deceased and on behalf of all survivors of James Robert Ostrowski;

KENNETH OSWALD, as Personal Representative of the Estate of Jason Oswald, Deceased and on behalf of all survivors of Jason Oswald;

SUSAN OU, as Personal Representative of the Estate of Michael Ou, Deceased and on behalf of all survivors of Michael Ou;

KATHLEEN OWENS, as Personal Representative of the Estate of Peter Owens, Deceased and on behalf of all survivors of Peter Owens;

YVETTE PABON, as Personal Representative of the Estate of Angel Pabon, Deceased and on behalf of all survivors of Angel Pabon;

BLANCA GUTIERREZ DE PAZ, as Personal Representative of the Estate of Victor Hugo Paz Gutierrez, Deceased and on behalf of all survivors

of Victor Hugo Paz Gutierrez;

BOBBIE CATHERINE PEAK, as Administrator of the Estate of Stacey Peak, Deceased and on behalf of all survivors of Stacey Peak;

SOPHIE PELLETIER, as Personal Representative of the Estate of Mike Pelletier, Deceased and on behalf of all survivors of Mike Pelletier;

LOURDES PEREZ-BERKELEY, as Personal Representative of tne Estate of Michael J. Berkeley, Deceased and on behalf of all survivors of Michael J. Berkeley;

PATRICIA PERRONCINO, as Administrator of the Estate of Joseph Perroncino, Deceased and on behalf of all survivors of Joseph Perroncino;

JOSEPH PERROTTA, as Personal Representative of the Estate of Edward Joseph Perrotta, Deceased and on behalf of all survivors of Edward Joseph Perrotta;

BERNARD PHAIR, as Personal Representative of the Estate of Joann Cregan, Deceased and on behalf of all survivors of Joann Cregan;

MURRAY C. PITT and ERIN PITT RICHARDS, as Co-Administrators of the Estate of Gregory Richards, Deceased and on behalf of all survivors of Gregory Richards;

SUSAN PRUNTY, as Administrator of the Estate of Richard Prunty, Deceased and on behalf of all survivors of Richard Prunty;

JODI RIVERSO, as Administrator of the Estate of Joseph R. Riverso, Deceased and on behalf of all

survivors of Joseph R. Riverso;
ELAINE RIZZA, as Administrator of the Estate of Paul Rizza, Deceased and on behalf of all survivors of Paul Rizza;
KATHERINE ROBSON, as Personal Representative of the Estate of Donald A. Robson, Deceased and on behalf of all survivors of Donald A. Robson;
ESTHER RODRIGUEZ, as Public Administrator of the Estate of Peter A. Bielfeld, Deceased and on behalf of Brittany Bielfeld, a minor and Therese Clarner, individually and as guardian ad litem for Brittany Bielfeld;
RONALD R. ROHNER, as Administrator of the Estate of Scott W. Rohner, Deceased and on behalf of all survivors of Ronald R. Rohner;
ALISSA ROSENBERG-TORRES, ad Administrator of the Estate of Luis Eduardo Torres, Deceased and on behalf of all survivors of Luis Eduardo Torres;
MICHELE SAND, as Personal Representative of the Estate of Eric Sand, Deceased and on behalf of all survivors of Eric Sand;
JOSEPH SANTO, as Administrator of the Estate of Susan Santo, Deceased and on behalf of all survivors of Susan Santo;
SHEILA SCANDOLE, a Personal Representative of the Estate of Robert L. Scandole, Deceased and on behalf of all survivors of Robert L. Scandole;
KENNETH G. SCHIELKE, as Personal Representative of the Estate of Sean

Schielke, Deceased and on behalf of all survivors of Sean Schielke;

JEFFREY SCHORPP, as Administrator of the Estate of Marisa DiNardo, Deceased and on behalf of all survivors of Marisa DiNardo;

PATRICIA B. SCHWARTZ, as Administrator of the Estate of Mark Schwartz, Deceased and on behalf of all survivors of Mark Schwartz;

CHARLES SCIBETTA, as Personal Representative of the Estate of Adrianne Scibetta, Deceased and on behalf of all survivors of Adrianne Scibetta;

CATHERINE SCULLIN, as Personal Representative of the Estate of Arthur Warren Scullin, Deceased and on behalf of all survivors of Arthur Warren Scullin;

LEONOR SHAHID and SYED SHAHID, as co-Administrators of the Estate of Khalid Shahid, Deceased and on behalf of all survivors of Khalid Shahid;

JYOTHI SHAH, as Administrator of the Estate of Jayesh Shah, Deceased and on behalf of all survivors of Jayesh Shah;

BENJAMIN SHAMAY, as Administrator of the Estate of Gary Shamay, Deceased and on behalf of all survivors of Gary Shamay;

JANINE SNYDER, as Administrator of the Estate of Leonard Snyder, Deceased and on behalf of all survivors of Leonard Snyder;

LAWAN SRINUAN and CHALERMCHAI SRINUAN, as Co-Administrators of the Estate of Saranya Srinuan and on behalf of all survivors of Saranya Srinuan;

DANIEL STAN, as Administrator of the Estate of Alexandru Stan, Deceased and on behalf of all survivors of Alexandru Stan;
PATRICIA A. STRAINE, as Personal Representative of the Estate of James J. Straine, Jr., Deceased and on behalf of all survivors of James J. Straine;
SUZANNE SWAINE, as Personal Representative of the Estate of John F. Swaine, Deceased and on behalf of all survivors of John F. Swaine;
MIDORI TAKAHASHI, as Personal Representative of the Estate of Keiji Takahashi, Deceased and on behalf of all survivors of Keiji Takahashi;
EMILY TERRY, as Personal Representative of the Estate of Andrew Kates, Deceased and on behalf of all survivors of Andrew Kates;
THOMAS EDWARD TIGHE, as Personal Representative of the Estate of Diane T. Lipari, Deceased and on behalf of all survivors of Diane T. Lipari;
KATHLEEN TRANT, as Administrator of the Estate of Daniel Trant, Deceased and on behalf of all survivors of Daniel Trant;
MARY TSELEPIS, as Personal Representative of the Estate of William P. Tselepis, Deceased and on behalf of all survivors of William P. Tselepis;
JULIE UMAN, as Personal Representative of the Estate of Jonathan Uman, Deceased and on behalf of all survivors of Jonathan Uman;
PATRICIA VILARDO, as Administrator of the Estate of Joseph

Vilardo, Deceased and on behalf of all survivors of Joseph Vilardo;

STANLEY WEINSTEIN, as Administrator of the Estate of Lisa Karen Orfi-Ehrlich, Deceased and on behalf of all survivors of Lisa Karen Orfi-Ehrlich;

CAROL WISNIEWSKI, as Administrator of the Estate of Frank Thomas Wisniewski, Deceased and on behalf of all survivors of Frank Thomas Wisniewski;

KATHLEEN M. WIK, as Administrator of the Estate of William J. Wik, Deceased and on behalf of all survivors of William J. Wik;

CHARLES WOLFE, as Administrator of the Estate of Katherine Wolfe, Deceased and on behalf of all survivors of Katherine Wolfe;

KAREN WORTLEY, as Administrator of the Estate of Martin Wortley, Deceased and on behalf of all survivors of Martin Wortley;

DYAN ZINZI, as Personal Representative of the Estate of Michael Zinzi, Deceased and on behalf of all survivors of Michael Zinzi;

CAROL ZION, as Personal Representative of the Estate of Charles A. Zion, Deceased and on behalf of all survivors of Charles A. Zion;

William Steven Goldstein
Timothy Molczyk
John Driscoll
Ladwin Brissett
Ellen McQueen
Marie Polite
Christopher Sparacia
Jill Fenwick
Sean Genovese
Daniel J. Pritzker
Brian J. Sullivan
Thomas McHugh
James J. Baranek
Robert Renode, Jr.
Gregory E. Manning

Hilda Valentine
Harry Waizer
Maria Ward
Peter Molnar
DEBORAH AMATO, as Personal Representative of the Estate of James A. Amato, Deceased and on behalf of all survivors of James A. Amato;
SANDRA BURNSIDE, as Personal Representative of the Estate of John P. Burnside, Deceased and on behalf of all survivors of John P. Burnside;
WARREN COLODNER, as Executor of the Estate of Patricia M. Colodner, Deceased and on behalf of all survivors of Patricia M. Colodner;
JEAN C. FISCHER, as Personal Representative of the Estate of John R. Fischer, Deceased and on behalf of all survivors of John R. Fischer;
LISA PALAZZO, as Personal Representative of the Estate of Thomas Palazzo, Deceased and on behalf of all survivors of Thomas Palazzo;
RICHARD A. PITINO, as Executor of the Estate of William G. Minardi, Deceased and on behalf of all survivors of William G. Minardi;
WILLIAM F. REILLY, as Administrator of the Estate of James Brian Reilly, Deceased and on behalf of all survivors of James Brian Reilly;
LINDA SARLE, as Administrator of the Estate of Paul F. Sarle, Deceased and on behalf of all survivors of Paul F. Sarle;
ELLEN SHEA, as Executor of the Estate of Daniel James Shea, Deceased, and on behalf of all survivors

of Daniel James Shea;
LORRAINE SPEAR, as Personal Representative of the Estate of Robert W. Spear, Deceased and on behalf of all survivors of Robert W. Spear;
DIANE STARITA, as Personal Representative of the Estate of Anthony Starita, Deceased and on behalf of all survivors of Anthony Starita;
HARUMI TAKAHASHI, as Personal Representative of the Estate of Keiichiro Takahashi, Deceased and on behalf of all survivors of Keiichiro Takahashi,
MARIA ARYEE, as Administrator of the Estate of Japhet Aryee, Deceased and on behalf of all survivors of Japhet Aryee;
JoANN ATLAS, as Personal Representative of the Estate of Gregg Arthur Atlas, Deceased and on behalf of all survivors of Gregg Arthur Atlas;
VLADIMIR BASIN, as Administrator of the Estate of Inna Basin, Deceased and on behalf of all survivors of Inna Basin;
PAULINE and CHARLES LESLIE BERKELEY, as Personal Representatives of the Estate of Graham Berkeley, Deceased and on behalf of all survivors of Graham Berkeley;
PAULA BERRY, as Administrator of the Estate of David S. Berry, Deceased and on behalf of all survivors of David S. Berry;
JOLANTA BOYARSKY, as Administrator of the Estate of Gennady Boyarsky, Deceased and on behalf of all survivors of Gennady Boyarsky;

PHILIP G. BRADSHAW, as Executor of the Estate of Sandra W. Bradshaw, Deceased and on behalf of all survivors of Sandra W. Bradshaw;
SUSAN CARROLL, as Administrator of the Estate of Kevin Colbert, Deceased and on behalf of all survivors of Kevin Colbert;
PATRICIA DEAN, as Personal Representative of the Estate of WILLIAM DEAN, Deceased and on behalf of all survivors of William Dean;
WILLIAM A. DREIER and MARY WRIGHT, as Co-Administrators of the Estate of Neil Wright, Deceased and on behalf of all survivors of Neil Wright;
IRINA DUBENSKAYA, as Administrator of the Estate of Eugueni Kniazev, Deceased and on behalf of all survivors of Eugueni Kniazev;
ZHANNA GALPERINA, as Administrator of the Estate of Arkady Zaltsman, Deceased and on behalf of all survivors of Arkady Zaltsman;
RANULFO and RENEE GAMBOA, as Personal Representatives of the Estate of David R. Brandhorst Gamboa, Deceased and on behalf of all survivors of David R. Brandhorst;
RACHEL W. GOODRICH, as Personal Representative of the Estate of Peter M. Goodrich, Deceased and on behalf of all survivors of Peter M. Goodrich;
BOBBY GRIFFIN, as Personal Representative of the Estate of Tawanna Griffin, Deceased and on behalf of all survivors of Tawanna Griffin;

GWYNETTA HURST, as Personal Representative of the Estate of Shannon Lewis Adams, Deceased and on behalf of all survivors of Shannon Lewis Adams;
LILLIAN ILOWITZ, as Administrator of the Estate of Abraham Ilowitz, Deceased and on behalf of all survivors of Abraham Ilowitz;
ELLA KHALIF, as Administrator of the Estate of Boris Khalif, Deceased and on behalf of all survivors of Boris Khalif;
JIN HEE KIM, as Personal Representative of the Estate of Hyun Joon Lee, Deceased, and on behalf of all survivors of Hyun Joon Lee;
PAUL KIM, as Personal Representative of the Estate Andrew Jay-Hoon Kim, Deceased, and on behalf of all survivors of Andrew Jay-Hoon Kim;
ARSEN KOLPAKOV, as Administrator of the Estate of Irina Kolpakova, Deceased and on behalf of all survivors of Irina Kolpakova;
NADADUR S. KUMAR, as Administrator of the Estate of Pendyala Vamsikrishna, Deceased and on behalf of all survivors of Pendyala Vamsikrishna;
NADADUR S. KUMAR, as Administrator of the Estate of Prasanna Kalahasthi, Deceased and on behalf of all survivors of Prasanna Kalahasthi;
NATALYA LOGINOVA, as Administrator of the Estate of Alexey Razuvaev, Deceased and on behalf of all survivors of Alexey Razuvaev;
SHARI MAIO, as Personal Representative of the

Estate of Joseph Daniel Maio, Deceased and on behalf of all survivors of Joseph Daniel Maio;

RAYNETTE MASCARENHAS, as Executor of the Estate of Bernard Mascarenhas, Deceased and on behalf of all survivors of Bernard Mascarenhas including Sven Herman Mascarenhas and Jaclyn Anne Marie Mascarenhas;

MARJORIE BETH MILLER, as Administrator of the Estate of Joel Miller, Deceased and on behalf of all survivors of Joel Miller;

SURI MORGENSTERN, as Administrator of the Estate of Nancy Morgenstern, Deceased and on behalf of all survivors of Nancy Morgenstern;

CATHY MUROLO, as Personal Representative of the Estate of Marc Murolo, Deceased and on behalf of all survivors of Marc Murolo,

MARY NICHOLSON, as Personal Representative of the Estate of M. Kathleen Shearer, Deceased and on behalf of all survivors of M. Kathleen Shearer;

MARY NICHOLSON, as Personal Representative of the Estate of Robert Shearer, Deceased and on behalf of all survivors of Robert Shearer;

GEORGE NICOSIA, as Administrator of the Estate of Kathleen Anne Nicosia, Deceased, and on behalf of all survivors of Kathleen Anne Nicosia,

FRANK K. PEZZUTI, as Personal Representative of the Estate of Kaleen E. Pezzuti, Deceased

and on behalf of all survivors of Kaleen E. Pezzuti,
VIVIAN BETH REUBEN, as Personal Representative of the Estate of Todd H. Reuben, Deceased and on behalf of all survivors of Todd H. Reuben;
VASILIY RIJOV, as Administrator of the Estate of Tatiana Ryjova Deceased and on behalf of all survivors of Tatiana Ryjova;
ILIA RODRIGUEZ, as Personal Representative of the Estate of Carlos R. Lillo, Deceased and on behalf of all survivors of Carlos R. Lillo·
LAUREN ROSENZWEIG, as Administrator of the Estate of Philip Rosenzweig, Deceased and on behalf of all survivors of Philip Rosenzweig
MARIA L. RYAN, as Administrator of the Estate of Jonathan S. Ryan, Deceased and on behalf of all survivors of Jonathan S. Ryan;
KIM STATKEVICUS, as Administrator of the Estate of Derek J. Statkevicus, Deceased and on behalf of all survivors of Derek J. Statkevicus,
JILL K. TARROU, as Personal Representative of the Estate of Michael C. Tarrou, Deceased and on behalf of all survivors of Michael C. Tarrou;
FRANK TAYLOR, as Personal Representative of the Estate of Lorisa Taylor, Deceased and on behalf of all survivors of Lorisa Taylor;
KIMBERLY TRUDEL, as Administrator of the Estate of Fred Rimmele, Deceased and on behalf of all survivors of Fred Rimmele;
Laura Bacarella;

Israel Halpern;
ERNESTO BARRERA, as Personal Representative of the Estate of Ana Gloria DeBarrera, Deceased and on behalf of all survivors of Ana Gloria DeBarrera;
SHARLENE M. BECKWITH and JAMES A. REED, as Co-Administrators of the Estate of Michele M. Reed, Deceased and on behalf of all survivors of Michele M. Reed;
BENITO COLON, as Administrator of the Estate of Soledi Colon, Deceased and on behalf of all survivors of Soledi Colon;
VICTORIA HIGLEY, as Administrator of the Estate of Robert Higley, Deceased and on behalf of all survivors of Robert Higley;
MAUREEN KELLY, as Administrator of the Estate of Mark Ludvigsen, Deceased and on behalf of all survivors of Mark Ludvigsen;
MARION KNOX, as Administrator of the Estate of Andrew Knox, Deceased and on behalf of all survivors of Andrew Knox;
LAURA J. LASSMAN, as Administrator of the Estate of Nicholas Lassman, Deceased and on behalf of all survivors of Nicholas Lassman;
PHILIP LEE and MEI JY LEE, as Co-Administrators of the Estate of Yang Der Lee, Deceased and on behalf of all survivors of Yang Der Lee;
MELVIN LEWIS & JOHN LEWIS, as Co-Personal Administrators of the Estate Margaret Lewis, Deceased and on behalf of all survivors of Margaret Lewis;
JOHN A. MARTIN and PAUL R. MARTIN, as Co-Administrators of the Estate of Karen Ann Martin,

Deceased and on behalf of all survivors of Karen Ann Martin;
JOVIANA MERCADO, as Administrator of the Estate of Steve Mercado, Deceased and on behalf of all survivors of Steve Mercado;
LINDA PASCUMA, as Personal Representative of the Estate of Michael J. Pascuma, Jr., Deceased and on behalf of all survivors of Michael J. Pascuma, Jr.;
SEAN PASSANANTI, as Executor of the Estate of Horace Passananti, Deceased and on behalf of all survivors of Horace Passananti;
HELEN PFEIFER, as Personal Representative of the Estate of Kevin Pfeifer, Deceased and on behalf of all survivors of Kevin Pfeifer;
DANIEL POLATSCH, as Personal Representative of the Estate of Laurence Polatsch, Deceased and on behalf of all survivors of Laurence Polatsch;
THERESA REGAN, as Personal Representative of the Estate of Donald Regan, Deceased and on behalf of all survivors of Donald Regan;
ARMAND REO, as Administrator of the Estate of John A. Reo, Deceased and on behalf of all survivors of John A. Reo;
ALEXANDER & MAUREEN SANTORO, as Personal Representatives of the Estate of Christopher Santoro, Deceased and on behalf of all survivors of Christopher Santoro;
NARASIMHA SATTALURI, as Administrator of the Estate of Deepika Kumar Sattaluri, Deceased and on behalf of all survivors

of Deepika Kumar Sattaluri;
CYNTHIA TUMULTY, as Administrator of the Estate of Lance Tumulty, Deceased and on behalf of all survivors of Lance Tumulty;
YUN YU ZHENG, as Administrator of the Estate of Kui Fai Kwok, Deceased and on behalf of all survivors of Kui Fai Kwok;
DAVID ZIMINSKI, as Administrator of the Estate of Ivelin Ziminski, Deceased and on behalf of all survivors of Ivelin Ziminski;
Robert Bermingham;
Mark Bernheimer;
Donald Didomenico;
Joseph Donovan;
William Ellis;
Michael Endrizzi;
Thomas Fletcher;
Mark Goldwasser;
Ron Harding;
Jeremiah Harney;
Peter Ioveno;
Jurgiel Kazimierz;
Robert Keane;
Raymond Lachhman;
George Lantay;
Houssain Lazaar;
Joyce Leigh;
Vincent Levien;
Jeff Lever;
Jerzy Mrozek;
Andrew Quinn;
Dennis Quinn;
Kevin Rogers;
Carmen Romero;
Christine Sakoutis;
Kemraj Singh;
Gary Wendell;
ANNE ANGELINI, as Administrator of the Estate of Joseph Angelini, Sr., Deceased and on behalf of all survivors of Joseph Angelini, Sr.;
KATHLEEN G. APOSTOL, as Administrator of the Estate of Faustino Apostol, Jr., Deceased and on behalf of all survivors of Faustino Apostol;
LOWELL L. BELL and PATRICIA BELL, as co-Administrators of the Estate of Nina P. Bell, Deceased and on behalf of all survivors of Nina P. Bell;

LINDA BOWMAN, as Personal Representative of the Estate of Larry Bowman, Deceased and on behalf of all survivors of Larry Bowman;
RICHARD PETER CARNEY, as Executor of the Estate of Mark Stephen Carney, Deceased and on behalf of all survivors of Mark Stephen Carney;
FRANCES M. COFFEY, as Personal Representative of the Estate of Daniel M. Coffey, Deceased and on behalf of all survivors of Daniel M. Coffey;
FRANCES M. COFFEY, as Personal Representative of the Estate of Jason M. Coffey, Deceased and on behalf of all survivors of Jason M. Coffey;
ANGELA DANZ, as Administrator of the Estate of Vincent Danz, Deceased and on behalf of all survivors of Vincent Danz;
GERALDINE DAVIE, as Administrator of the Estate of Amy O'Doherty, Deceased and on behalf of all survivors of Amy O'Doherty;
CHRISTOPHER V. DELLA PIETRA, as Administrator of the Estate of Joseph A. Della Pietra, Deceased and on behalf of all survivors of Joseph A. Della Pietra;
MARIAN FONTANA, as Administrator of the Estate of David J. Fontana, Deceased and on behalf of all survivors of David J. Fontana;
ELISABET GARDNER, as Administrator of the Estate of William Arthur Gardner, Deceased and on behalf of all survivors of William Arthur Gardner;
ROXANN GIORDANO, as Administrator of

the Estate of John Giordano, Deceased and on behalf of all survivors of John Giordano;

JOHN F. GREGORY, as Administrator of the Estate of Florence Moran Gregory, Deceased and on behalf of all survivors of Florence Moran Gregory;

JOANNE HATTON, as Administrator of the Estate of Leonard Hatton, Jr., Deceased and on behalf of all survivors of Leonard Hatton, Jr.;

MARIE HUNCHAK, as Administrator of the Estate of Andrew Lacorte, Deceased and on behalf of all survivors of Andrew Lacorte;

MARY JEANETTE JONES, as Executrix of the Estate of Charles Jones, Deceased and on behalf of all survivors of Charles Jones;

MAUREEN KENNEDY, as Administrator of the Estate of Robert Kennedy, Deceased and on behalf of all survivors of Robert Kennedy;

SHERI ANNE LADLEY, as Executrix of the Estate of James P. Ladley, Deceased and on behalf of all survivors of James P. Ladley;

KIMBERLEY S. LAMANTIA, as Administrator of the Estate of Stephen Lamantia, Deceased and on behalf of all survivors of Stephen Lamantia;

CAROL LAEITA, as Administrator of the Estate of Vincent A. Leita, Deceased and on behalf of all survivors of Vincent A. Leita;

KIM L. LASKO, as Executrix of the Estate of Gary E. Lasko, Deceased and on behalf of all survivors of Gary E. Lasko;

MELVIN LEWIS and JOHN LEWIS, as Co-

Administrators of the Estate of Margaret Lewis, Deceased and on behalf of all survivors of Margaret Lewis;

DENISE LYNCH, as Administrator of the Estate of Michael Lynch, Deceased and on behalf of all survivors of Michael Lynch;

ANNE MARIE MCCANN, as Administrator of the Estate of Thomas McCann, Deceased and on behalf of all survivors of Thomas McCann;

MICHELLE MCCRANN, as Administrator of the Estate of Charles A. McCrann, Deceased and on behalf of all survivors of Charles A. McCrann;

LIDIA MELENDEZ, as Administrator of the Estate of Mirna A. Duarte, Deceased and on behalf of all survivors of Mirna A. Duarte;

ENRICA NACCARATO, as Administrator of the Estate of Lorraine Lisi, Deceased and on behalf of all survivors of Lorraine Lisi;

MARY NICHOLSON, as Administrator of the Estate of Robert Shearer, Deceased and on behalf of all survivors of Robert Shearer;

ANDREA O'HAGAN, as Administrator of the Estate of Thomas G. O'Hagan, Deceased and on behalf of all survivors of Thomas G. O'Hagan;

JOHN ERIC OLSON, as Administrator of the Estate of Maureen Lyons Olson, Deceased and on behalf of all survivors of Maureen Lyons Olson;

ALREDO F. ORTIZ, as Administrator of the Estate of Alexander Ortiz, Deceased and on behalf of all survivors of Alexander Ortiz;

SAMPATH PAKKALA, as Administrator of the Estate of Deepa Pakkala, Deceased and on behalf of all survivors of Deepa Pakkala;
EDWARD RADBURN, as Administrator of the Estate of Bettina Browne, Deceased and on behalf of all survivors of Bettina Browne;
CARMEN RODRIGUEZ, as Administrator of the Estate of Angel Perez, Deceased and on behalf of all survivors of Angel Perez;
GRISSEL RODRIGUEZ-VALENTIN, as Administrator (Ad Prosequendum) of the Estate of Benito Valentin, Deceased and on behalf of all survivors of Benito Valentin;
SUSAN ROSSINOW, as Administrator of the Estate of Norman Rossinow, Deceased and on behalf of all survivors of Norman Rossinow;
DAE JIN RYOOK, as Administrator of the Estate of Christina S. Ryook, Deceased and on behalf of all survivors of Christina S. Ryook;
ARLENE SACERDOTE, as Administrator of the Estate of Joseph Sacerdote, Deceased and on behalf of all survivors of Joseph Sacerdote;
PAULA SHAPIRO, as Co-Administrator of the Estate of Eric Eisenberg, Deceased and on behalf of all survivors of Eric Eisenberg;
JERRI SMITH, as Administrator of the Estate of Kevin Smith, Deceased and on behalf of all survivors of Jerri Smith;
MARY E. TADDEI, as Voluntary Administrator of the Estate of Norma C. Taddei, Deceased and on behalf of all

survivors of Norma C. Taddei;
CONSUELO VELAZQUEZ, as Administrator of the Estate of Jorge Velazquez, Deceased and on behalf of all survivors of Jorge Velazquez;
FLOYD WEIL, as Administrator of the Estate of Joanne Weil, Deceased and on behalf of all survivors of Joanne Weil;
DARREN WILLIAMS, as Administrator of the Estate of Debbie Williams, Deceased and on behalf of all survivors of Debbie Williams;
KENNETH WILLIAMS, as Administrator of the Estate of Brian Patrick Williams, Deceased and on behalf of all survivors of Brian Patrick Williams;
HELEN ZACCOLI, as Administrator of the Estate of Joseph Zaccoli, Deceased and on behalf of all survivors of Joseph Zaccoli;
JILL ZANGRILLI, as Administrator of the Estate of Mark Zangrilli, Deceased and on behalf of all survivors of Mark Zangrilli;
DOROTA ZOIS, as Personal Representative of the Estate of Prokopias (Paul) Zois, Deceased and on behalf of all survivors of Prokopias (Paul) Zois;
Ronald De Francesco;
Dennis Sirjuesingh;
Guy Rosbrook;
Tamar Rosbrook;
Maria Ward;
CHRISTY FERER, as Personal Representative of the Estate of Neil Levin, Deceased and on behalf of all survivors of Neil Levin;
JULIO CESAR FERNANDEZ, as Personal Representative of the Estate of Julio Fernandez, Deceased and on behalf of all

survivors of Julio Fernandez;
CAROL LAIETA, as Administrator of the Estate of Vincent A. Laieta, Deceased and on behalf of all survivors of Vincent A. Laieta;
JUAN MARTINEZ, as Personal Representative of the Estate of Waleska Martinez, Deceased and on behalf of all survivors of Waleska Martinez;
MICHAEL RAMBOUSEK, as Representative of the Estate of Luke Rambousek, Deceased and on behalf of all survivors of Luke Rambousek;
LAURIE WEINBERG, as Administratrix of the Estate of Steven Weinberg, Deceased and on behalf of all survivors of Steven Weinberg;
SUSAN WOHLFORTH, as Executor of the Estate of Martin Wohlforth, Deceased and on behalf of all survivors of Martin Wohlforth;
Danny Ray Johnson;
Frank Maisano;
ARLENE BEYER, as Representative of the Estate of Arlene Beyer, Deceased and on behalf of all survivors of Arlene Beyer;
SUSAN CORREA, as Representative of the Estate of Ruben Correa, Deceased and on behalf of all survivors of Ruben Correa;
EILEEN GERATY, as Administrator of the Estate of Suzanne Geraty, Deceased and on behalf of all survivors of Suzanne Geraty;
DONNA HICKEY, as Representative of the Estate of Brian Hickey, Deceased and on behalf of all survivors of Brian Hickey;
JENNIFER MINGIONE, as Representative of the Estate of Thomas

Mingione, Deceased and on behalf of all survivors of Thomas Mingione;

PATRICK J. MULLAN, as Representative of the Estate of Michael Mullan, Deceased and on behalf of all survivors of Patrick J. Mullan;

JENNIFER REILLY, as Representative of the Estate of Kevin Reilly, Deceased and on behalf of all survivors of Kevin Reilly;

MARY ILL, as Representative of the Estate of Frederick J. Ill, Jr., Deceased and on behalf of all survivors of Frederick J. Ill, Jr.;

MARCELLA LEAHY, as Representative of the Estate of James P. Leahy, Deceased and on behalf of all survivors of James P. Leahy;

JOY & WILLIAM JOHNSON, as Representatives of the Estate of William Johnson, Jr., Deceased and on behalf of all survivors of William Johnson, Jr.;

STEPHEN SAUCEDO, as Representative of the Estate of Gregory Saucedo, Deceased and on behalf of all survivors of Gregory Saucedo;

DENA SMAGALA, as Representative of the Estate of Stanley Smagala, Deceased and on behalf of all survivors of Stanley Smagala;

CARMEN SUAREZ, as Representative of the Estate of Ramon Suarez, Deceased and on behalf of all survivors of Ramon Suarez;

PAULETTE ROBERTS and THOMAS ROBERTS as Co-Representatives of the Estate of Michael E. Roberts, Deceased and on behalf of all survivors of Michael E. Roberts;

BARBARA ANN SWAT, as

Representative of the Estate of Gerald Thomas Atwood, Deceased, and on behalf of all survivors of Gerald Thomas Atwood;
LAURA WEINBERG, as Representative of the Estate of Richard Aronow, Deceased, and on behalf of all survivors of Richard Arnow;
Anthony Accardo,
Luis Acevedo,
Peter Acquafrea,
Michael Agovino,
Kenneth Ahlers,
Thomas Akerberg,
Richard Alles,
Robert Annunziato,
Vincent Anderson,
Andrew Ansbro,
Harry Antonopoulos,
Salvatore Anzalone,
Lawrence Archer,
Joseph Astarita,
Christopher Attanasio,
Anthony Auciello,
Joseph Bachert,
Michael Bailey,
Augustin Balaram,
West Ballou,
Richard Banat,
Paul Barbara,
Paul Bardo,
Thomas Baroz,
Robert Barrett,
Bruce Barvels,
Steven Bascelli,
Paul Basso,
Andrew Beard,
Mario Bell,
John Belmonte,
Timothy Bennett,
Joseph Bennett,
James Bergen,
Joseph Bering,
Charles Bernardi,
Daniel Beyar,
George Beyer,
Gregory Bierster,
Joseph Biserta,
William Blaich,
Peter Blaich,
Susan Blake,
Mark Blanchard,
Godfrey Blythe,
John Bongiorno,
Reginald Bonner,
Mark Bonsanti,
Robert Bornhoeft,
Nicholas Borrillo,
George Braadt,
Manuel Bracero,
James Brady,
Thomas Brady,
Joseph Breen,
Gerald Brenkert,
James Brennan,
Ronald Brenneisen,
Vito Brinzo,
Michael Brody,

Christopher Broughton,
Peter Brown,
Raymond Brown,
James Bruno,
Greg Bruno,
David Brunsden,
John Byrnes,
Michael Buckley,
Vincent Buonocore,
Matthew Buono,
James Burke,
William Burke,
Thomas Burke,
Robert Burns,
Francis Calabro,
Robert Calise,
Richard Camiolo,
Ernando Camacho,
Ronald Cammarata,
Richard Campbell,
Bryan Campbell,
Matthew Campisi,
Vincent Canale,
Victor Cantelmo,
Michael Capasso,
Charles Caple,
David Caputo,
Harry Cardio,
Patrick Carey,
Peter Carino,
William Carlson,
Angel Carrero,
William Carlson,
William Carroll,
John Carroll,
Robert Caruso,
Joseph Casaliggi,
Donald Casey,
James Cash,
Stephen Casse,
John Cassidy,
Stephen Cassidy,
Gregory Castellano,
Joseph Cestari,
Anthony Chaimowitz,
Dino Chirco,
Sherwin Chow,
Jeffrey Christensen,
Robert Christy,
Frank Ciaravino,
Raymond Clancy,
Donald Clark,
Dennis Clarke,
Brian Claro,
James Cody,
Robert Colligan,
Carmelo Composto,
Stephen Conklin,
David Conlin,
Kevin Connelly,
Thomas Connolly,
Michael Connolly,
William Connolly,
Steven Connor,
Kenneth Cook,
Michael J.Corrigan, Jr.,
Michael Corrigan,
Christopher Corsi,
Edward Costello,
Roy Cotignola,
Patrick Cotton,
John Coughlin,

Christopher Coughlin,
Richard Coyle,
Omar Crisostomo,
Charles Crocco,
Patrick Cullen,
Richard Curiel,
Edward Cutting,
Dennis Czeczotka,
Kenneth D'Albero,
Peter D'Ancona,
Dominic D'Arrigo,
Steven Dahlstrom,
John Daly,
Daniel Daly,
Thomas Damore,
Arthur Darby,
Kevin Darcy,
Gerard Davan,
Joseph Dawson,
Rodney Decort,
Francis Defeo,
William Delehanty,
James Depaob,
Robert Desandis,
Raymond Diaz,
Mark Dimaggio,
Richard Diorio,
Charles Dirico,
Kevin Doherty,
Thomas Doherty,
Michael Dolan,
Michael Donohue,
William Donohue,
Michael Donovan,
Michael Dorgan,
James Dorman,
John Dougherty,
Leonard Draves,
Joseph Driscoll,
Richard Driscoll,
Kevin Duffy,
John Dunn,
Joseph Dunn,
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Gerald Chiavelli;
Bundy Chung
William T. Collins;
James Connolly;
John Coombs
Richard Coyne;
Chris Craven;
Peter Curcio;
Frank Curnyn;
Alan Dagistino;
Philip Dagostino;
Nicholas Demasi;
Raymond Denninger;
Dominick Devito;
John Devlin;
Robert Digiovanni;
Andrew Digiugno;
John Dixon;
Thomas J. Doherty;
Francis Donahue;
Richard Dubowy;
Brian Duffy;
Joseph Dunn;
George Edgeworth;
William Edwards;
William Ellis;
Steven Fedorczuk;
Manuel Fernandez;
Edward Ferraro;
Michael Fitzmaurice;
George Foris;
Nicholas Fornario;
Gregory Forsyth;
Michael Fossati;
James Freer;
John Fullam;
Dennis Gallagher;
Robert Gallagher;
Anne Garcia;
Rafael Garcia;
Rudolph Geiger;
Bruce Gerrie;
Garry Giannandrea;
Guerino
Giannattanasio;
Thomas Gillam;
Philip Guarnieri;
Leakat Hanif;
Darren Harkins;
Eugene Harris;
Richard Harrison;
Francis Haskell;
Michael Heffernan;
Joseph Hickey;
Donald Hoffman;
James Hurson;
Salvatore J. Isabella;
Byron Johnson;
Leroy Jonas;
Robert Jones;
Kazimierz Jurgiel;
James Kadnar;
Patrick Kissane
Carlos Kuper;
Richard Lacerra;
Stephen P. Lee

Artie Leecock;
Thomas Lent;
Salvatore Lumia;
Charlie Lyons;
Michael Mackl;
Frank Macri;
Frank Maisano;
Andrew Majors;
Felipe Marcano;
John Mark;
Erik Marrero;
Antonio Martino;
John Massarotti;
Christopher Massaria;
Thomas
Mastrodomenico;
Mark Mastros;
Garry Maurice;
Christopher
McCormack;
David McDonough;
Michael McFarland;
James McHugh;
Tim McInerney;
Michael Melillo;
James Miller;
Richard Miranda;
John Miskanic;
Elizardo Montes;
Frank Moore;
Michael Moore;
Thomas Moore;
Audrey Mosley Marcus;
Raul Muniz;
Joseph Murphy;
Michael Musto;
Paul Nigro;
Joseph O'Brien;
Christopher O'Donnell;
Joseph O'Donnell;
Howard O'Hringer;
Edward Parker;
Ronald Pascucci;
Hilton Pearce;
Frank Perry;
Michael Perry;
Freedman Pfeil;
Joseph Piccininni;
Andrew Porrazzo;
Carl Punzone;
John Quevado;
James Ragarn;
Sebastian Raspanti;
Herman Reyes;
Vito Ribaudo;
Louie Rios;
Hector Rivera;
Robert Ryan;
Thomas Ryan;
Eric Scaknoff;
James Schiavone;
William Schillinger;
Robert Schor;
Angel Serrano;
Luis Serrano;
Giuseppe Sibilla;
Jeffrey Simms;
Gerard Simpson;
Joseph Skonieczny;
Adolph Stampfel;
Jimmie D. Sullivan;
Michael Suwalski;
Gary Suson;
Keith Tanico;

Peter Tartaglione;
Jeff Tesoriero;
Donald Thompson;
John Tiska;
Edgar Torres;
Peter Tracy;
Brian Urban;
Anthony Valetta;
Thomas Vanrossem;
Mario Vascon;
Jose Velazquez;
Guy Villano;
Gregory Voce;
Ed Wallace;
Christopher Wanker;
Mack Washington;
Michael Welsh;
John Whyte;
Derek Williams;
Martin Zoller;
SHERI G. BURLINGAME, in her capacity as Administratrix of the Estate of CHARLES FRANK;
BURLINGAME, III, Deceased, and in her personal capacity and as the personal representative of the Estate of CHARLES F. BURLINGAME, III;
RUDY ABAD, Individually, as Personal Representative of the Estate of MARIA ROSE ABAD, Deceased, and on behalf of all survivors of MARIA ROSE ABAD;
CYNTHIA LYNN BARKWAY, Individually, as Personal Representative of the Estate of DAVID MICHAEL BARKWAY, Deceased, and on behalf of all survivors of DAVID MICHAEL BARKWAY;
MAUREEN BASNICKI, Individually, as Personal Representative of the Estate of KENNETH BASNICKI, Deceased, and on behalf of all survivors of KENNETH BASNICKI;
BHOLA AND BASMATTIE BISHUNDAT, Individually, and as Personal Representatives of the Estate of KRIS

ROMEO BISHUNDAT, Deceased, and on behalf of all survivors of KRIS ROMEO BISHUNDAT;
THOMAS BOCCHINO, Individually, as Personal Representative of the Estate of MICHAEL BOCCHINO, Deceased, and on behalf of all survivors of MICHAEL BOCCHINO;
IRENE BOEHM, Individually, as Personal Representative of the Estate of BRUCE BOEHM, Deceased, and on behalf of all survivors of BRUCE BOEHM;
MANUEL BOURDIER, Individually, as Personal Representative of the Estate of FRANCISCO BOURDIER, Deceased, and on behalf of all survivors of FRANCISCO BOURDIER;
KRISTEN BREITWEISER, Individually, as Personal Representative of the Estate of RONALD BREITWEISER, Deceased, and on behalf of all survivors of RONALD BREITWEISER;
ERICA BRENNAN, Individually, as Personal Representative of the Estate of PETER BRENNAN, Deceased, and on behalf of all survivors of PETER BRENNAN;
KATHLEEN BRUNTON, Individually, as Personal Representative of the Estate of VINCENT BRUNTON, Deceased, and on behalf of all survivors of VINCENT BRUNTON;
DEBORAH RAZZANO, Individually, as Personal Representative of the Estate of ANTHONY

COLADONATO, Deceased, and on behalf of all survivors of ANTHONY COLADONATO;
THERESA COVE, Individually, as Personal Representative of the Estate of JAMES E. COVE, Deceased, and on behalf of all survivors of JAMES E. COVE;
JAMES CUDMORE, Individually, as Personal Representative of the Estate of NEIL CUDMORE, Deceased, and on behalf of all survivors of NEIL CUDMORE;
AMY WATERS, Individually, as Personal Representative of the Estate of SCOTT DAVIDSON, Deceased, and on behalf of all survivors of SCOTT DAVIDSON;
LORRAINE DELAPENHA, Individually, as Personal Representative of the Estate of DONALD A. DELAPENHA, Deceased, and on behalf of all survivors of DONALD A. DELAPENHA;
VIRGINIA DiCHIARA, Individually;
IRENE DICKEY, Individually, as Personal Representative of the Estate of JOSEPH DICKEY, Deceased, and on behalf of all survivors of JOSEPH DICKEY;
ROSEMARY DILLARD, Individually, as Personal Representative of the Estate of EDDIE DILLARD, Deceased, and on behalf of all survivors of EDDIE DILLARD;
LESLIE DIMMLING, Individually, as Personal Representative of the Estate of WILLIAM DIMMLING, Deceased, and on behalf of all survivors

of WILLIAM DIMMLING;
MARGUERITA DOMANICO, Individually, as Personal Representative of the Estate of JAMES DOMANICO, Deceased, and on behalf of all survivors of JAMES DOMANICO;
CHRISTOPHER DOWLING, Individually, as Personal Representative of the Estate of MARY YOLANDA DOWLING, Deceased, and on behalf of all survivors of MARY YOLANDA DOWLING;
CYNTHIA M. DROZ, Individually, as Personal Representative of the Estate of CHARLES DROZ, Deceased, and on behalf of all survivors of CHARLES DROZ;
JACQUELINE EATON, Individually, as Personal Representative of the Estate of ROBERT EATON, Deceased, and on behalf of all survivors of ROBERT EATON;
KEVIN FARRELL, Individually;
CHONG P. FARRELL, Individually;
CATHERINE ANN FAUGHNAN, Individually, as Personal Representative of the Estate of CHRISTOPHER FAUGHNAN, Deceased, and on behalf of all survivors of CHRISTOPHER FAUGHNAN;
MARCO CALLE, Individually, as Personal Representative of the Estate of HENRY HOMERO FERNANDEZ, Deceased, and on behalf of all survivors of HENRY HOMERO FERNANDEZ;
MARY AND FRANK FETCHET, as Personal Representatives of

the Estate of BRADLEY FETCHET, Deceased, and on behalf of all survivors of BRADLEY FETCHET;
ERIN FINNEGAN, Individually, as Personal Representative of the Estate of MICHAEL FINNEGAN, Deceased, and on behalf of all survivors of MICHAEL FINNEGAN;
CARLOS GAMBOA, Individually, as Personal Representative of the Estate of GIANN F. GAMBOA, Deceased, and on behalf of all survivors of GIANN F. GAMBOA;
CATHY GEYER, Individually, as Personal Representativeof the Estate of JAMES G. GEYER, Deceased, and on behalf of all survivors of JAMES G. GEYER;
GERALD GOLKIN, Individually, as Personal Representative of the Estate of ANDREW H. GOLKIN Deceased, and on behalf of all survivors of ANDREW H. GOLKIN;
ANA RALEY, Individually, as Executrix of the Estate of IAN GRAY, Deceased, and on behalf of all survivors of IAN GRAY;
RAYMOND HABIB, Individually, as Personal Representative of the Estate of BARBARA HABIB, Deceased, and on behalf of all survivors of BARBARA HABIB;
THOMAS P. HEIDENBERGER, Individually, as Personal Representative of the Estate of MICHELE HEIDENBERGER, Deceased, and on behalf of all survivors of MICHELE HEIDENBERGER;
BRENDAN RYAN, Individually, as

Personal Representative of the Estate of KRISTIN IRVINE RYAN, Deceased, and on behalf of all survivors of KRISTIN IRVINE RYAN;

SHERI ANN ISKENDERIAN, Individually, as Personal Representative of the Estate of ARAM ISKENDERIAN, Deceased, and on behalf of all survivors of ARAM ISKENDERIAN;

JENNIFER L. JARDIM, Individually, as Administratrix of the Estate of MARK S. JARDIM, Deceased, and on behalf of all survivors of MARK S. JARDIM;

ELIZABETH JORDAN, Individually, as Personal Representative of the Estate of ROBERT JORDAN, Deceased, and on behalf of all survivors of ROBERT JORDAN;

GEOFFREY JUDGE, Individually, as Personal Representative of the Estate of ANN JUDGE, Deceased, and on behalf of all survivors of ANN JUDGE;

JANET KELLEY, Individually, as Personal Representative of the Estate of FREDERICK KELLEY, Deceased, and on behalf of all survivors of FREDERICK KELLEY;

JOANNE KELLY, Individually, as Personal Representative of the Estate of JAMES KELLY, Deceased, and on behalf of all survivors of JAMES KELLY;

PAUL AND VIVIAN KOLPAK, Individually, and as Co-Administrators of the Estate of VANESSA KOLPAK,

Deceased, and on behalf of all survivors of VANESSA KOLPAK;
ELIZABETH KOVALCIN, Individually, as Personal Representative of the Estate of DAVID P. KOVALCIN, Deceased, and on behalf of all survivors of DAVID P. KOVALCIN;
SANDRA LANG, Individually, as Personal Representative of the Estate of BRENDAN LANG, Deceased, and on behalf of all survivors of BRENDAN LANG;
DONNA CABALLERO, and WILLIAM M. LANG, Individually, as Personal Representatives of the Estate of ROSEANN LANG, Deceased, and on behalf of all survivors of ROSEANN LANG;
CAROLANN LARSEN, Individually, as Personal Representative of the Estate of SCOTT LARSEN, Deceased, and on behalf of all survivors of SCOTT LARSEN;
CAROLE LEAVEY, Individually, as Personal Representative of the Estate of JOSEPH GERARD LEAVEY, Deceased, and on behalf of all survivors of JOSEPH GERARD LEAVEY;
SUSAN LENOIR, Individually, as Personal Representative of the Estate of JOHN ROBINSON LENOIR, Deceased, and on behalf of all survivors of JOHN ROBINSON LENOIR;
JOSEPH J. REITANO, Individually, as Personal Representative of the Estate of VINCENT LITTO, Deceased, and on behalf of ail survivors of VINCENT LITTO;

ELIZABETH DAVILA-LOPEZ, Individually, as Personal Representative of the Estate of DANIEL LOPEZ, Deceased, and on behalf of all survivors of DANIEL LOPEZ;

EILEEN LYNCH, Individually, as Personal Representative of the Estate of FARRELL LYNCH, Deceased, and on behalf of all survivors of FARRELL LYNCH;

BLANE MAGEE, Individually, as Personal Representative of the Estate of BRIAN MAGEE, Deceased, and on behalf of all survivors of BRIAN MAGEE;

BRINLEY MALONEY, Individually, as Personal Representative of the Estate of EDWARD F. MALONEY, III, Deceased, and on behalf of all survivors of EDWARD F. MALONEY, III;

MEGAN MANNING, Individually, as Personal Representative of the Estate of TERENCE JOHN MANNING, Deceased, and on behalf of all survivors of TERENCE JOHN MANNING;

LYNN McGUINN, Individually, as Personal Representative of the Estate of FRANCIS McGUINN, Deceased, and on behalf of all survivors of FRANCIS McGUINN;

TARYN McHALE, Individually, as Personal Representative of the Estate of THOMAS McHALE, Deceased, and on behalf of all survivors of THOMAS McHALE;

ELIZABETH McLAUGHLIN, Individually, as Personal Representative of the Estate of ROBERT McLAUGHLIN, Deceased, and on

behalf of all survivors of ROBERT McLAUGHLIN;

MARK MORABITO, Individually, as Personal Representative of the Estate of LAURA LEE MORABITO, Deceased, and on behalf of all survivors of LAURA LEE MORABITO;

CATHERINE MORAN, Individually, as Personal Representative of the Estate of KATHLEEN MORAN, Deceased, and on behalf of all survivors of KATHLEEN MORAN;

KIMBERLY A. MARTONE, Individually, as Personal Representative of the Estate of CHRISTOPHER M. MORRISON, Deceased, and on behalf of all survivors of CHRISTOPHER M. MORRISON;

PATRICK MULLAN, Individually, as Personal Representative of the Estate of MICHAEL D. MULLAN, Deceased, and on behalf of all survivors of MICHAEL D. MULLAN;

AMY NACKE, Individually, as Personal Representative of the Estate of LOUIS J. NACKE, Deceased, and on behalf of all survivors of LOUIS J. NACKE;

AMY NEWTON, Individually, as Executrix of the Estate of CHRISTOPHER NEWTON, Deceased, and on behalf of all survivors of CHRISTOPHER NEWTON;

SUSAN NEWTON-CARTER, Individually, as Personal Representative of the Estate of CHRISTOPHER NEWTON-CARTER,

Deceased, and on behalf of all survivors of CHRISTOPHER NEWTON-CARTER;
EDWARD NICHOLLS, Individually;
STACIE NICHOLLS, Individually;
LISA O'BRIEN, Individually, as Personal Representative of the Estate of TIMOTHY O'BRIEN, Deceased, and on behalf of all survivors of TIMOTHY O'BRIEN;
ANTOINETTE D. OGNIBENE, Individually, as Personal Representative of the Estate of PHILLIP PAUL OGNIBENE, Deceased, and on behalf of all survivors of PHILLIP PAUL OGNIBENE;
DANIEL ORTH, Individually, as Personal Representative of the Estate of JANE MARIE ORTH, Deceased, and on behalf of all survivors of JANE MARIE ORTH;
WANDA GARCIA-ORTIZ, Individually, as Personal Representative of the Estate of EMILIO ORTIZ, Deceased, and on behalf of all survivors of EMILIO ORTIZ;
CAROLYN PANATIER, Individually, as Personal Representative of the Estate of CHRISTOPHER M. PANATIER, Deceased, and on behalf of all survivors of CHRISTOPHER M. PANATIER;
NAVILA PATTERSON, Individually, as Personal Representative of the Estate of BERNARD E. PATTERSON, Deceased, and on behalf of all survivors of BERNARD E. PATTERSON;
MICHAEL QUINN, Individually, as Personal

Representative of the Estate of JAMES QUINN, Deceased and on behalf of all survivors of JAMES QUINN;

MARILYN REICH, Individually, as Personal Representative of the Estate of HOWARD REICH, Deceased, and on behalf of all survivors of HOWARD REICH;

JAMES J. RICHES, Individually, as Personal Representative of the Estate of JAMES C. RICHES, Deceased, and on behalf of all survivors of JAMES C. RICHES;

BERNARD P. SALAMONE, Individually, as Executor of the Estate of MARJORIE C. SALAMONE, Deceased, and on behalf of all survivors of MARJORIE C. SALAMONE;

DANIELLE SALERNO, Individually, as Personal Representative of the Estate of JOHN SALERNO, Deceased, and on behalf of all survivors of JOHN SALERNO;

SALLY CALVIN, Individually, as Personal Representative of the Estate of FRANK SALVATERRA, Deceased, and on behalf of all survivors of FRANK SALVATERRA;

LYNNE SAN PHILLIP, Individually, as Personal Representative of the Estate of MICHAEL V. SAN PHILLIP, Deceased, and on behalf of all survivors of MICHAEL V. SAN PHILLIP;

DARA SEAMAN, Individually, as Personal Representative of the Estate of MICHAEL SEAMAN, Deceased, and on behalf of all

survivors of MICHAEL SEAMAN;
MARIA SILVERSTEIN, Individually, as Personal Representative of the Estate of CRAIG SILVERSTEIN, Deceased, and on behalf of all survivors of CRAIG SILVERSTEIN;
LAURIE SIMOWITZ, Individually, as Personal Representative of the Estate of BARRY SIMOWITZ, Deceased, and on behalf of all survivors of BARRY SIMOWITZ;
JAMES P. SLATTERY, Individually, as Personal Representative of the Estate of CHRISTOPHER PAUL SLATTERY, Deceased, and on behalf of all survivors of CHRISTOPHER PAUL SLATTERY;
SUSAN M. SLIWAK, Individually, as Personal Representative of the Estate of ROBERT F. SLIWAK, Deceased, and on behalf of all survivors of ROBERT F. SLIWAK;
MICHAEL T. JAMMEN, Individually, as Personal Representative of the Estate of HEATHER L. SMITH, Deceased, and on behalf of all survivors of HEATHER L. SMITH;
CHRISTINE SPENCER, Individually, as Personal Representative of the Estate of ROBERT A. SPENCER, Deceased, and on behalf of all survivors of ROBERT A. SPENCER;
BARBARA STECKMAN, Individually, as Personal Representative of the Estate of WILLIAM STECKMAN, Deceased, and on behalf of all survivors

of WILLIAM STECKMAN;
LORRAINE SZOCIK, Individually, as Personal Representative of the Estate of KEVIN T. SZOCIK, Deceased, and on behalf of all survivors of KEVIN T. SZOCIK;
BASIL G. THORPE AND VALDA M. BINNS, Individually, and as Co-Administrators of the Estate of NICHOLA ANGELA THORPE, Deceased, and on behalf of all survivors of NICHOLA ANGELA THORPE;
ANNE TODISCO, Individually, as Personal Representative of the Estate of RICHARD TODISCO, Deceased, and on behalf of all survivors of RICHARD TODISCO;
TANJA TOMASEVIC, Individually, as Personal Representative of the Estate of VLADIMIR TOMASEVIC, Deceased, and on behalf of all survivors of VLADIMIR TOMASEVIC;
DORRY GROH-TOMPSETT, Individually, as Personal Representative of the Estate of STEPHEN TOMPSETT, Deceased, and on behalf of all survivors of STEPHEN TOMPSETT;
MARY ELIZABETH TUCKER, Individually, as Personal Representative of the Estate of MICHAEL P. TUCKER, Deceased, and on behalf of all survivors of MICHAEL P. TUCKER;
JENNIFER VAUK, Individually, as Personal Representative of the Estate of L. COL. RONALD VAUK, Deceased, and on behalf of all survivors of L. COL. RONALD VAUK;

NAYDA VOSKERIJIAN, Individually, as Personal Representative of the Estate of GARO H. VOSKERIJIAN, Deceased, and on behalf of all survivors of GARO H. VOSKERIJIAN;
ALLISON WALLICE, Individually, as Personal Representative of the Estate of JOHN WALLICE, JR., Deceased, and on behalf of all survivors of JOHN WALLICE, JR.;
MICHELLE GARTNER, Individually, as Personal Representative of the Estate of DINAH WEBSTER, Deceased, and on behalf of all survivors of DINAH WEBSTER;
MARCIA WEISS, Individually, as Personal Representative of the Estate of DAVID T. WEISS, Deceased and on behalf of all survivors of DAVID T. WEISS;
PATRICK WELSH, Individually, as Personal Representative of the Estate of DEBORAH ANNE WELSH, Deceased, and on behalf of all survivors of DEBORAH ANNE WELSH;
BENJAMIN WONG, Individually, as Personal Representative of the Estate of JENNIFER Y. WONG, Deceased, and on behalf of all survivors of JENNIFER Y. WONG;
PAMELA WORKS, Individually, as Personal Representative of the Estate of JOHN BENTLEY WORKS, Deceased, and on behalf of all survivors of JOHN BENTLEY WORKS;
ELAINE M. CHEVALIER, as Administrator of the

Estate of Swede Chevalier, Deceased and on behalf of all survivors of SWEDE CHEVALIER;
MAUREEN S. DOMINGUEZ, as Administrator of the Estate of Carlos Dominguez, Deceased, and on behalf of all survivors of CARLOS DOMINGUEZ;
PHYLLIS GILLY and JOSEPH GILLY, as Administrators of the Estate of Laura Gilly, Deceased, and on behalf of all survivors of LAURA GILLY;
YONGJIN L. SONG, HYUNGSHIN K. SONG, as Administrators of the Estate of Daniel W. Song AKA Won-Hyeong Song, Deceased, and on behalf of all survivors of DANIEL W. SONG AKA WON-HYEONG SONG;
MARC TADDONIO, as Executor of the Estateof Michael Taddonio, Deceased, and on behalf of all survivors of MICHAEL TADDONIO;
ERNST H. BUCK and JOSEPHINE BUCK, as Parents and Natural Guardians of GREGORY J. BUCK, Deceased and on behalf of all survivors of Gregory J. Buck;
KENNETH CHU, as Administrator of the Estate of Pamela Chu, Deceased and on behalf of all survivors of Pamela Chu;
LOUISA D'ANTONIO, as Administrator of the Estate of Mary D'Antonio, Deceased and on behalf of all survivors of Mary D'Antonio;
KATHRYN R. DENNIS, as Administrator of the Estate of Thomas F. Dennis, Deceased and on behalf of all survivors of Thomas F. Dennis;
TERESA GOMEZ, as Administrator of the Estate of Enrique A. Gomez, Deceased and

on behalf of all survivors of Enrique A. Gomez;
BLANCA GOMEZ, as Administrator of the Estate of Jose B. Gomez, Deceased and on behalf of all survivors of Jose B. Gomez;
SANDRA MUNRO, as Administrator of the Estate of Elvira Granitto, Deceased and on behalf of all survivors of Elvira Granitto;
MARY JEAN HELLER, as Administrator of the Estate of H. Joseph Heller, Deceased and on behalf of all survivors of H. Joseph Heller;
EDWARD HENRY AND ALICE HENRY, Individually;
EDWARD HENRY AND ALICE HENRY, as Administrators of the Estate of Joseph Patrick Henry, Deceased and on behalf of all survivors of Joseph Patrick Henry;
DOHEE KANG, as Administrator of the Estate of Joon Koo Kang, Deceased and on behalf of all survivors of Joon Koo Kang;
ALISON M. KINNEY, as Administrator of the Estate of Brian Kinney, Deceased and on behalf of all survivors of Brian Kinney;
ANNA M. KREN, as Executor of the Estate of John J. Kren, Deceased and on behalf of all survivors of John J. Kren;
DENNIS LEVI and JENNIFER LISITSIN, as Administrators of the Estate of John Levi, Deceased and on behalf of all survivors of John Levi;
ERIC LEVINE, individually;
CHRISTINA LYNCH, as Administrator of the Estate of Richard D. Lynch, Deceased and on behalf of all

survivors of Richard D. Lynch;

NICHOLAS MAOUNIS, as Administrator of the Estate of James Maounis, Deceased and on behalf of all survivors of James Maounis;

SHEILA MARTELLO, as Executor of the Estate of James Martello, Deceased and on behalf of all survivors of James Martello;

MADELINE LEW MOY, as Personal Representative of the Estate of Teddington H. Moy, Deceased and on behalf of all survivors of Teddington H. Moy;

HEIDI NAPLES, as Administrator of the Estate of Frank J. Naples, Deceased and on behalf of all survivors of Frank J. Naples;

MARY DUFF-ORTALE, as Administrator of the Estate of Peter Keith Ortale, Deceased and on behalf of all survivors of Peter Keith Ortale;

ALEXANDRA M. ORTIZ, as Administrator of the Estate of Sonia M. Ortiz, Deceased and on behalf of all survivors of Sonia M. Ortiz;

MEGAN P. PELINO, as Administrator of the Estate of Todd Douglas Pelino, Deceased and on behalf of all survivors of Todd Douglas Pelino;

JANE POLLICINO, as Executor of the Estate of Steven Pollicino, Deceased and on behalf of all survivors of Steven Pollicino;

BARBARA ROPITEAU-GALLOWAY, as Administrator of the Estate of Eric Thomas Ropiteau, Deceased and on behalf of all survivors of Eric Thomas Ropiteau;

EUGENIA BOGADO, as Administrator of the Estate of Carlos A. Samaniego, Deceased and on behalf of all survivors of Carlos A. Samaniego;
JACQUELINE GALLERON, as Executor of the Estate of Selina Sutter, Deceased and on behalf of all survivors of Selina Sutter;
JANE TERRENZI, as Executor of the Estate of Brian Terrenzi, Deceased and on behalf of all survivors of Brian Terrenzi;
CAROL WALDIE, as Administrator of the Estate of Kenneth Waldie, Deceased and on behalf of all survivors of Kenneth Waldie;
LING N. YOUNG and DONALD M. YOUNG, Individually;
PATRICIA FITZSIMONS, as Executor of the Estate of Richard Fitzsimons, Deceased and on behalf of all survivors of Richard Fitzsimons;
CHRISTINE O'BERG, as Administrator of the Estate of Dennis O'Berg, Deceased and on behalf of all survivors of Dennis O'Berg;
DENNIS O'BERG, individually;
JEAN M. PALOMBO, as Administrator of the Estate of Frank A. Palombo, Deceased and on behalf of all survivors of Frank A. Palombo;
CORRINE J. EVANS and CHARLES R. EVANS, as Co-Administrators of the Estate of Eric B. Evans, Deceased and on behalf of all survivors of Eric B. Evans;
NANCY H. KIMBELL, as Administrator of the Estate of Mary Booth, Deceased and on behalf of all survivors of Mary Booth;

CHRISTINIA L. KMINEK, as Personal Representative of the Estate of Mari-Rae Sopper, Deceased and on behalf of all survivors of Mari-Rae Sopper;
LORRAINE LYNCH, as Administrator of the Estate of Sean Lynch, Deceased and on behalf of all survivors of Sean Lynch;
ELIZABETH McNALLY, as Administrator of the Estate of Edmund McNally, Deceased and on behalf of all survivors of Edmund McNally;
JOSEPH RICHARD MICKLEY, as Executor of the Estate of Patricia E. Mickley, Deceased and on behalf of all survivors of Patricia E. Mickley;
ELAINE P. MILLER and CORRINE KRACHTUS, as Personal Representatives of the Estate of Daphne Pouletsos, Deceased and on behalf of all survivors of Daphne Pouletsos;
ARJAN MIRPURI, as Personal Representative of the Estate of Rajesh Mirpuri, Deceased and on behalf of all survivors of Rajesh Mirpuri;
SUSANNE MLADENIK, as Executor of the Estate of Jeffrey P. Mladenik, Deceased and on behalf of all survivors of Jeffrey P. Mladenik;
JANICE KAY PUNCHES, as Executor of the Estate of Capt. Jack D. Punches, USN, Retired, Deceased and on behalf of all survivors of Capt. Jack D. Punches, USN, Retired;
ABRAHAM SCOTT, as Administrator of the Estate of Janice M. Scott, Deceased and on behalf of all

survivors of Janice M. Scott;
KATHY A. CORDERO;
VALENCIA L. PARKER;
DENNIS VIANNA and MARILYNDA VIANNA, Individually and as Administrators of the Estate of Mathew G. Gianna, Deceased and on behalf of all survivors of Mathrew G. Gianna;
NANCY HOLZHAUER, Individually and as Administratrix of the Estate of Gerard P. Rauzi, Deceased and on behalf of all survivors of Gerard P. Rauzi;
ELIZABETH ANN PAYNE, Individually and as Executrix of the Estate of William Wilson, Deceased and on behalf of all survivors of William Wilson;
PATRICIA WREN, Individually and as Administratrix of the Estate of William Wren, Deceased and on behalf of all survivors of William Wren;
MARGARET MATHERS, Individually and as Executrix of the Estate of Charles Mathers, Deceased and on behalf of all survivors of Charles Mathers;
CHRISTINE JEAN-PIERRE, Individually and as Executrix of the Estate of Francois Jean-Pierre, Deceased and on behalf of all survivors of Francois Jean-Pierre;
PATRICIA GREENE-WOTTON, Individually and as Executrix of the Estate of Rodney Wotton, Deceased and on behalf of all survivors of Rodney Wotton;
PATRICIA CUBAS-BIELFELD, Individually;
ROBERT EICHELE and CARMELA EICHELE, Individually;

MICHAEL HENRY and REBECCA HENRY, Individually;
JAMES B. LEACH and CARRIE LEACH, Individually;
JAMES McCAFFREY and AGNES McCAFFREY, Individually;
KEVIN WARD, Individually;
VIRGINIA BAUER, Individually and as Executrix of the Estate of W. DAVID BAUER, Deceased;
CATHY ANN BONNETT, Individually and as Administratrix of the Estate of COLIN BONNETT, Deceased;
DEBORAH BOWDEN, Individually and as Executrix of the Estate of THOMAS BOWDEN, Deceased;
JENNIFER BOWMAN, Individually and as Administratrix of the Estate of SHAWN E. BOWMAN, Deceased;
ELIZABETH CANDELA, Individually and as Administratrix of the Estate of JOHN CANDELA, Deceased;
TOMOKO T. SCHLAG, Individually and as Executrix of the Estate of STEVEN F. SCHLAG, Deceased;
BETH MURPHY, Individually and as Administratrix of the Estate of KEVIN J. MURPHY, Deceased;
ROSEANN ZISA, Individually and as Administratrix of the Estate of SALVATORE ZISA, Deceased;
MICHELE JONES, Individually and as Executrix of the Estate of DONALD JONES, Deceased;
AMY VASEL, Individually and as Administratrix of the Estate of SCOTT VASEL, Deceased;
MARGARET MEYER, Individually and as Executrix of the

Estate of DAVID R. MEYER, Deceased;
BARBARA GALLUCCI, Individually and as Administratrix of the Estate of VINCENZO GALLUCCI, Deceased;
ARLENE ORSINI, Individually and as Administratrix of the Estate of RONALD ORSINI, Deceased;
EILEEN HANNAFORD, Individually and as Administratrix of the Estate of KEVIN HANNAFORD, Deceased;
JILL GOLDSTEIN, Individually and as Administratrix of the Estate of STEVEN GOLDSTEIN, Deceased;
AUDREY MAGNUSON, Individually and as Executrix of the Estate of RONALD E. MAGNUSON, Deceased;
KAREN D'AMBROSI, Individually and as Executrix of the Estate of JACK L. D'AMBROSI, Deceased;
SUSAN MAGAZINE, Individually and as Administratrix of the Estate of JAY MAGAZINE, Deceased;
KATHERINE MAHER, Individually and as Executrix of the Estate of DANIEL L. MAHER, Deceased;
ELLEN ROBB, Individually and in her capacity as Proposed Co-Administrator of the Estate of KRISTEN MONTANARO, Deceased;
MICHELLE TANNER, Individually and as Executrix of the Estate of MICHAEL TANNER, Deceased;
MARIE CARLINO, Individually and as Executrix of the Estate of EDWARD CARLINO, Deceased;
PANDORA PO BHARVANEY, Individually and as Administratrix of the Estate of ANIL T.

BHARVANEY, Deceased;
DEBRA ZEPLIN, Individually and as Executrix of the Estate of MARC SCOTT ZEPLIN, Deceased;
LAURA BUSTILLO, Individually and as Administratrix of the Estate of MILTON BUSTILLO, Deceased;
CAROLE DiFRANCO, Individually and as Administratrix of the Estate of CARL DiFRANCO, JR., Deceased;
CAMERON F. MACRAE, III, Individually and as Administrator of the Estate of CATHERINE FAIRFAX MACRAE, Deceased;
DONALD MAURO, Individually and as Administrator of the Estate of NANCY T. MAURO, Deceased;
JOHN SANDERS, Individually and as Administrator of the Estate of STACEY L. SANDERS, Deceased;
JENNIFER PRICE, Individually and as Executrix of the Estate of JEAN ELIZABETH HOADLEY PETERSON, Deceased;
SANDRA VALDEZ FELT, Individually and as Executrix of the Estate of EDWARD P. FELT, Deceased;
ROSE KELLER, Individually and as Administratrix Administratrix of the Estate of JOSEPH KELLER, Deceased,
LYZBETH GLICK, Individually and as Administratrix of the Estate of JEREMY GLICK, Deceased;
ELSA STRONG, Individually and as Executrix of the Estate of LINDA GRONLUND, Deceased;
JOHN DiMEGLIO, Individually and as Administrator of the Estate of DAVID

DIMEGLIO, Deceased;
BARBARA RATCHKO, Individually and as Administratrix of the Estate of BRYAN JACK, Deceased;
MICHAEL GIORDANO, Individually and as Administrator of the Estate of DONNA GIORDANO, Deceased;
ROSA CAICEDO, as Mother and Legal Guardian of LESLIE VARGAS and KEVIN VARGAS, the Natural Children of DAVID VARGAS, Deceased, and as Proposed Administratrix and/or personal representative of the Estate of DAVID VARGAS, Deceased;
JILL SWIFT, Individually and as Executrix of the Estate of THOMAS SWIFT, Deceased;
LISA BEAMER, Individually and as Executrix of the Estate of TODD BEAMER, Deceased;
JENNIFER G. BRENNAN, Individually and as Administratrix of the Estate of THOMAS M. BRENNAN, Deceased;
SUSAN BEATINI, Individually and as Administratrix of the Estate of PAUL F. BEATINI, Deceased;
MARY DANAHY, Individually and as Executrix of the Estate of PATRICK W. DANAHY, Deceased;
KATHLEEN M. WISNIEWSKI, Individually and as Administratrix of the Estate of ALAN L. WISNIEWSKI, Deceased;
TERESA CUNNINGHAM, Individually and as Administratrix of the Estate of MICHAEL J. CUNNINGHAM, Deceased;
BEVERLY ECKERT, Individually and as Executrix of the

Estate of SEAN ROONEY, Deceased;
PATRICIA RYAN, Individually and as Executrix of the Estate of JOHN J. RYAN, Deceased;
LORI KANE, Individually and as Administratrix of the Estate of HOWARD L. KANE, Deceased;
SUZANNE SISOLAK, Individually and as Administratrix of the Estate of JOSEPH M. SISOLAK, Deceased;
THOMAS S. JOHNSON, Individually and as Administrator of the Estate of SCOTT M. JOHNSON, Deceased;
H. MICHAEL KEDEL, as Executor of the Estate of Adam Jay Lewis, Deceased;
NANCY FOSTER, as Personal Representative of the Estate of Noel John Foster, Deceased;
CHIEMI YORK, as Administrator of the Estate of Kevin Patrick York, Deceased;
JENNIFER TARANTINO, as Executor of the Estate of Kenneth J. Tarantino, Deceased;
MARY SMITH, Individually and as Administratrix of the Estate of Daniel Laurence Smith, Deceased;
CHERYL SCHNEIDER, in her own right and as the Executrix of the ESTATE OF IAN SCHNEIDER, Deceased;
NANCY DIMINO, in her own right and as the Executrix of the ESTATE OF STEPHEN DIMINO, Deceased;
MATILDE SALCEDO, in her own right and as the Personal Representative of the ESTATE OF ESMERLIN SALCEDO, Deceased;
SUSAN CONNORS, in her own right and as the Executrix of the ESTATE OF

JONATHAN M. CONNORS, Deceased;
GERARD JEAN BAPTISTE, in his own right and as the Proposed Personal Representative of the ESTATE OF GERARD BAPTISTE, Deceased;
DEBORA ANN CRISMAN, in her own right and as Administratrix of the ESTATE OF DANIEL HAL CRISMAN, Deceased;
MAYORE ESTATES, LLC and 80 LAFAYETTE ASSOCIATES, LLC

The *Burnett* Petitioners

Thomas E. Burnett, Sr.
Beverly Burnett
Deena Burnett
Mary Margaret Burnett
Martha Burnett O'Brien
William Doyle, Sr.
Camille Doyle
William Doyle, Jr.
Doreen Lutter
Dr. Stephen Alderman
Elizabeth Alderman
Jane Alderman
Yvonne V. Abdool
Alfred Acquaviva
Josephine Acquaviva
Kara Hadfield
Jessica Murrow-Adams
Stephen Jezycki
James Alario
Catherine Jezycki
Karium Ali
Jennifer D'Auria
Michael J. Allen
Jocelyne Ambroise
Philipson Azenabor
John P. Baeszler
Mary Barbieri
Armando Bardales
Gila Barzvi
Arie Barzvi
John Benedetto
Rina Rabinowitz
Maria Giordano
Michael Girdano
Ondina Bennett
Frances Berdan
Pra Kash Bhatt
Miles Bilcher
Irene Bilcher
Boris Belilovsky
Emma Tisnovskiy
Leonid Tisnovskiy
Rostyslav Tisnovskiy
Basmattie Bishundat
Bhola P. Bishundat
Krystyna Boryczewski
Michele Boryczewski

Michael Boryczewski
Julia Boryczewski
Nelly Braginskaya
Eduardo E. Bruno
Ernst H. Buck
Eric Buck
Josephine Buck
Julio Caceres
Steven T. Campbell
Jeanne M. Maurer
Linda Maurer
Joseph Maurer
Margaret Canavan
Thomas Canavan
Rosemary Celine Traynor
Teresa McCaffery
Kathleen McKeon
Ciaran Canavan
Teresa Difato
Antonio Difato
Suzan Cayne
Jordan Cayne
Nageswararao Chalasani
Nicholas M. Chiarchiaro, Sr.
Nicholas J. Chiarchiaro
Lisa Sokol
Lynne Cillo-Capaldo
Nunzi C. Cillo
Gary Cillo
Sharron L. Clemons
Martin J. Collins
Martin Collins
Patricia Amo
Eileen Byrne
Anne M. Collins
Cornelius P. Clancy, III
Kevin S. Clancy
Vera Clancy
Lawrence Cubas
Dorothy Cubas
Alfonso Cubas, Jr.
Grace D'Esposito
Ralph D'Esposito
Selena Dack Forsyth
Francis L. Danahy, Jr.
Mary-Anne Dwyer Danahy
Michael Francis Danahy
Maryanne Danahy
John M. Danahy
Kathleen A. Danahy Samuelson
Denise Danahy Duffy
Amy Waters Davidson
Stephen Davidson
Carla Dimaggio
Michael Davidson
Joaquim "Tim" T. Dearaujo
Michele Defazio
James Defazio
Rose Defazio
Michael Defazio
Gricel Moyer
Antonio Difato
Teresa Difato
Frank Dominguez
Diane Egan
Colleen D'Amato

Michael Egan
Mark Egan
Martin Egan, Sr.
Patricia Egan
Marlyse Bosley
Simone Esposito
Rose Esposito
Denise Palazzotto
Simone Esposito
Joseph Esposito
Salvatore Esposito
Frank Esposito
Dorothy Esposito
Michael Esposito
Richard Esposito
Dominick Esposito
Catherine Esposito
Vincent Esposito
Cathy L. Fersini
Leileth Foster
Haven A. Fyfe
Joseph A. Micciulli
Joseph C. Micciulli
Margaret Micciulli
Tina Maldonado
John T. Gatto
Eleanor Gillette
Sali Gjonbalaj
Herbert Gladstone
Morris Sonny Goldstein
Cecilia Goldstein
Adrienne Triggs
William Goodchild
Ellen R. Goodchild
Neil K. Goodchild
Edwin H. Yuen
Anthony Guzzardo
Eileen A. Hannaford
James T. Hannaford
Nancy E. Hannaford
Patrick G. Hannaford
Elizabeth Hannaford Saraceno
R. Jay Harris
Mildred Harris
Gail Hoffmann
Gail Hoffmann
Janet Holmes-Alfred
Robin Hohlweck
Todd W. Hohlweck
Randolph T. Hohlweck
Mary Hrabowska
Jean Hunt
William F Hunt, Jr.
Candee J. Maltese
Melanie A. Hunt
Beatriz E. Hymel
Gloria Ingrassia
Anthony A. Ingrassia
Anthony W. Ingrassia
Paul B. Ingrassia
Elisa M. Ingrassia
Clifford Jenkins
Jennifer E. Josiah
Kelly C. Josiah
Nazam Khan
Susanne Kikkenborg
Vivian Lerner Shoemaker
Ethel Chamberlain
Albert A. Chamberlain
Susan G. Chamberlain
Cynthia D. Oricchio
Albert G. Chamberlain

Arnold Lederman
Edward N. Lee
Johnny Lee
Sherman Lillianthal
Marcia Lillianthal
Mindi Cohen
Eugenia R. Llanes
Gary Michael Low
Rebecca Alyson Low
Bobbie Jean Low
Ralph Luzzicone
Debra Luzzicone
Ralph Luzzicone, Jr.
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Shakeh Mardikian
Alexander Mardikian
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Owen Miuccio
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Eugene Molinaro
Lawrence Molinaro
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Theodore C. Morehouse
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Sara M. Mulligan
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Mary Nee Reilly
Patricia B. Nee O'Keefe
Fook Sam Ngooi
Edward O'Hare
Vincent A. Ognibene
Antoinette D. Ognibene
Patricia Olson
Maria Koutny
Wilston Parris
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Jerry Patrick
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Alicia M. Patrick
Kathryn M. Patrick
Michael Patti
Frances Patti
Juliann Patti-Andolpho
Michael Patti, Jr.
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Paul Pesce
Chiara Pesce
Frank Pesce
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Albert P. Petrocelli, Jr.
Virginia Petrocelli
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Bambang Priatno
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Kathleen A. Progen
Matthew Eric Progen
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Antoinette Nicholasi
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Mi Ja Quigley
John Quigley
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Michael Resta
Thomas Resta
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Christine Mazzeo
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Patricia Heyne
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Theresa Tarantino
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Dorothy Tempesta
Rosalyn Temple
Bidiawattie Tewari
Denise Thompson
Martin Toyen
Nancy D. Tzemis
Sophia Tzemis
Nicole Tzemis
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Kathy Viggiano
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Jason Visciano
Robert Visciano
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Mary P. Weinberg
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Wilma Wiener
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Lucille C. Willett
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Jeffrey Wittenstein
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Michele Yarnell
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Dianne Young
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Livia Chirchirillo
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William Havlish
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Thomas P. Heidenberger
Theresann Lostrangio
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Martin Panik

Martina Lyne-Anna Panik
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Lauren Arias Lucchini
Lorraine Arias Beliveau
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Nicholas Barbaro
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Daryl Joseph Meehan
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Maureen Burns-Dewland
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Linda Cammarata

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Kimberly Cammarata
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Helen J. Cangialosi
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Kathleen Cangialosi Rue
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Nicholas Caporicci
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Frank Caporicci
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Venkateswanango Chalasani
Sujana Chalasani
Sandhya Chalasani
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Marie Colbert
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Lauren Comer
Kevin Connolly
Sylvia L. Connors
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Pui Yee Coppola
George J. Coppola, Sr.
Cynthia Coppola Kaiser
Charles P. Costa
Lawrence Costello
Catherine Coughlan
Denise Coughlan
Sinead Coughlan
Ailish Coughlan
Orla Bowie
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Lynne Elizabeth Cramer
Walter H. Cramer
Marc S. Cramer
Keith Cramer
Susan Lynne Kinney
Walter H. Cramer
Enrique Cruz
Fernando Cuba
Carmen Cubero
Maureen Cummins
Alice Sciusco
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Raquel D'Amadeo
Hipolito D'Oleo
Brigitte Day
Judith Day
Maria De Olio-Beato
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Carole Di Franco
Nancy Di Franco Levy
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Petronilo Ruiz Diaz
Cecilia Diaz
Edrick Dillard
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Laura D. Dunstan
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Corrine J. Evans
Stacey Farrelly
Joseph Farrelly
Theresa Farrelly
Devin Farrelly
Ryan Farrelly
Michael Farrelly
Patrick M. Farrelly
Dennis Farrelly
Dennis Nielsen, Sr.
Rose Nielsen
Frank Fava
Dennis Nielsen, Jr
Delio A. Feliz
Hernando Fernandez
Vincent Ferranti
Edward Finnegan
Christine Karas Fisher
Jonathan Michael Fisher
Serena Fisher Dugan
Theresa Folino-Montuori
Tessie Molina
John A. Foster
Marion Rosette Foster
Katherine Fumando
Margaret Fumando
Gregory Fumando
Stephen Fumando
Carlo Fumando
Catherine Marotte
Cynthia Furmato
Joseph Furmato
Margaret Furmato
Mark Furmato
Joseph Furmato
Jill Keough
Carol Debenedictis
Anthony Galante
April D. Gallop
Maria Regina Merwin
Paul E. Geidel
Patricia M. Geidel
Ralph W. Geidel, Sr.
Michael Geidel
Christine A. Norris
Stephan J. Gerhardt
Susan Giberson
Martin Giovinazzo, Sr.
Domenica Giovinazzo
Dorothy Giovinazzo
Rose Mahoney
Concetta Bonner
Angela Quinn
Benjamin Alexander Glascoe
Gloria Glascoe
Veronica Squef
Gerald Goldberg
Marilyn Goldberg
Fausto A. Gomez
Ruben Gordillo
Teresa Grimner
Charles G. Grimner
Virginia Kwiatkoski

Mary Ann Peters
Angel Guzman
Anthony C. Guzzardo
Geraldine Halderman
Marianne Angelo
Robert Hall
Jeraldine Halligan
Travor Halligan
Emma Louise Arro
Walter E. Hamilton
William Hankins
Anthony K. Hanson
Norma Haynes
George Henrique
Patricia A. Henrique
Paul R. Henrique
Michael Henrique
Christina Henrique
Maragret McCrane
Joseph Herencia
Julio Herencia
Kevin Carr
Peter Carr
Eslyn J. Hernandez
Eulogia Hernandez
Jacqueline Hernandez
Catherine Hernandez
Thomas Hickey
John Douglas Higley
Lisa Ann Preston
Vivian Byas
Doris Holmes
Ralph L. Howell
Jennifer Woodward Hunt
Joseph Ianelli
Barbara Ianelli
Monica Iken
Gerard Iken
Anne Habeeb
Aram P. Jarret, Jr.
Marilyn R. Trudeau
Marc Douglas Jarret
Matthew R. Jarret
Aram P. Jarret, III
Alicia N. Curran
Luis B. Jimenez
Ysidro Jimenez
Joyce L. Johnson
Fitz-Harry Alexander Johnson
Seong Soon Kang
Pil Soon Kang
Janet Kang
Rebecca Hoang
Jamie Kang
Denise K. Keasler
Alice B. Kelly
Carolyn Kelly
Nancy Knox
Patricia B. Knox
James Knox
Denis Knox
Mary Ellen Knox
Patricia B. Lalley
Kathleen Doolan
Robert Kobus
Leokadia Kobus
Felix Ksido
Richard L. Lane
Janet L. Lane
Jason M. Lane
Suzanne R. Stevenson

Donna Marsh O'Connor
Delores Laverde
Suzanne Lawrence
Robert A. Lawrence
Eileen Lawrence
Elizabeth Anderson
Arthur Leahy
Ann Leavy
John Leavy
Mark Leavy
Geneva Johnson
Nichole Williams
Anthony Johnson
John Johnson
Janet Johnson
Cherly Witherspoon
Shirley Walker
Joan Greene
Timothy R. Greene
Terence Greene
Thomas M. Greene
Barbara Wentworth
Patricia Reilly
Otis Lewis
Anthony Licciardi
Edward Locher
George T. Long
Sandra S. Weaver
David Long
George W. Long
Cynthia Long
Nancy Burcham
Arnaldo Lopez
James Lovero
John Peter Lozowsky, Sr.
Rosemary Lozowsky
Debra A. Rhody
Michelle Ludwig
Christopher Ludwig
Ashley Ludwig
Jesse L. Lynch
John B. Lynch
Kathleen V. Lynch
Frederick Lynch
Kathleen Ann Lynch
Patricia Curry
Linda Maffeo
Louis Maffeo
Jean Maffeo
Debra Maffeo Morri
Linda Maffeo Manfredi
Susan Maffeo Drury
Donna Maffeo
Llewellyn Malcolm
Kenneth R. Mannetta
Charles V. Margiotta
Amelia J. Margiotta
Norma Margiotta
Michael Margiotta
Claudia P. Marin
Jodi A. Marrero
Angela Martinez
Mildred Martino
Anthony Martino
Patricia Nilsen
Margaret L. Mathers
Elizabeth Mattson
James F. Mattson
Jean E. Mattson
Vertistine B. Mbaya
Kibabu Mbaya
Njue W. Mbaya

Marilyn McGovern Zurica
Semo P. Sennas
Frances N. Sennas
Mary McWilliams
Joseph McWilliams
Lynn McWilliams
Barbara McWilliams
Nexhat Mela
Judy Michaels
Patricia Milano
Alfred Milano
Frank Milano
Thomas Milano
Maureen Racioppi
Stella Lazarra
Sondra Fowler
Toby Millman
Ryan Paul Minara
Christian Minara
Nykia Morgan
Glenn Morgan
Kevin J. Morgan
Lorraine Moskal
Omar Mota
Thomas Mulligan
Nancy Mulligan
Maritza Munoz
Mary L. Murphy
Baldev Narula
Madhu Narula
Jose L. Nivar
Santos Nunez
Robert T. O'Brien
Mary Lou O'Brien
Andrew T. O'Brien
Bridget Paluzzi
Mary Dishaw
Kenneth D. Olson
Angel R. Ortiz
Veronica N. Ortiz
Victor D. Panzella, Jr.
Yogesh R. Patel
Ramanbhas M. Patel
Sushilaben R. Patel
Jayant R. Patel
Kapila Patel
Niraj Patel
Rantik Patel
Nimisha Patel
Vibhuti Patel
Milcia C. Pena
Guido Peralta
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Anne Marie Pescherine
William Kevin Pescherine
Nancy Gionco
Maneula Pichardo
Barbara L. Polhemus
Salvatore Provenzano
Michael Quackenbush
Gail Quackenbush
Leonard S. Ragaglia
Maureen Ragaglia
Donna Ragaglia
Linda Taccetta
Vincent J. Ragusa
Domenica Ragusa
Kenneth J. Ragusa
Vincent Carl Ragusa
Christine Saladeen

Lenore Raimondi
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APPENDIX L

CORPORATE DISCLOSURE STATEMENTS

Petitioners Federal Insurance Company, Pacific Indemnity Company, Chubb Custom Insurance Company, Chubb Indemnity Insurance Company, Chubb Insurance Company of Canada, Chubb Insurance Company of New Jersey, Great Northern Insurance Company, and Vigilant Insurance Company are members of the Chubb Group of Insurance Companies. Petitioners' parent organization, Chubb Corporation, a publicly traded corporation, owns more than 10% of their stock.

Petitioners One Beacon Insurance Company, One Beacon America Insurance Company, American Employers' Insurance Company, The Camden Fire Insurance Association, and Homeland Insurance Company of New York are members of the One Beacon Insurance Group. Petitioners' parent organization, White Mountains Insurance Group, a publicly traded corporation, owns more than 10% of their stock.

Petitioners American Alternative Insurance Corporation, Great Lakes Reinsurance U.K. PLC, and The Princeton Excess and Surplus Lines Insurance Company are subsidiaries of Muenchener Rueckversicherungs, a publicly traded corporation, which owns more than 10% of their stock.

Petitioner Allstate Insurance Company is a member of The Allstate Insurance Group. Allstate Insurance Company is wholly owned by The Allstate Corporation, a publicly traded corporation.

Petitioners Boston Old Colony Insurance Company, Continental Insurance Company, Commercial Insurance Company of Newark, NJ, CNA Casualty of

California, Continental Insurance Company of New Jersey, Fidelity and Casualty Company of New York, Glens Falls Insurance Company, and National Ben Franklin Insurance Company of Illinois are members of the CNA Insurance Companies. Petitioners' parent organization, the CNA Financial Corporation, a publicly traded corporation, owns more than 10% of their stock.

Petitioner Hiscox Dedicated Corporation Member, Ltd. is a member of Lloyds' Syndicate 33.

Petitioners ACE American Insurance Company, ACE Capital V Ltd for itself and as representative of all subscribing underwriters for ACE Global Markets Syndicate 2488, ACE Bermuda Insurance Ltd, ACE INA (Canada), ACE Indemnity Insurance Company, ACE Insurance SA-NV, ACE Property & Casualty Insurance Company, Atlantic Employers Insurance Company, Bankers Standard Insurance Company, Indemnity Insurance Company of North America, Insurance Company of North America, Westchester Fire Insurance Company, Westchester Surplus Lines Insurance Company, and Pacific Employers Insurance Company are members of ACE INA Group. Petitioners' parent organization, ACE Limited, a publicly traded corporation, owns more than 10% of their stock.

Petitioner Woburn Insurance Ltd. is a captive insurance company, wholly owned by CBS Corporation, a publicly traded corporation.

Petitioner TIG Insurance Company is a member of the Fairfax Financial Group. Petitioner's parent organization, Fairfax Financial Holdings Ltd, a publicly traded corporation, owns more than 10% of its stock.

Petitioners AXA Corporate Solutions Assurance, AXA Corporate Solutions Insurance Company, AXA Corporate Solutions Assurance UK Branch, AXA Corporate Solutions Assurance (Canada), AXA RE Asia Pacific Pte. Limited, AXA RE, AXA RE Canadian Branch, AXA RE UK Plc., AXA Corporate Solutions Reinsurance Company, AXA Art Insurance Corporation, SPS Reassurance, AXA Re Madeira Branch, Compagnie Gererale de Reinsurance de Monte Carlo, AXA Versicherung AG, AXA Cessions and AXA Global Risks UK, Ltd. are members of the AXA Group. Petitioners' parent organization, AXA Group, a publicly traded corporation, owns more than 10% of their stock.

Petitioners Euro Brokers Inc., Maxcor Financial Group Inc., Maxcor Financial Inc., Maxcor Financial Asset Management Inc., Tradesoft Technologies, Inc., Maxcor Information Inc., Euro Brokers Ltd., Euro Brokers Financial Services Limited, Euro Brokers Mexico, S.A. de C.V., and Euro Brokers (Switzerland) S.A. have no parent corporation, and no publicly held company owns 10% or more of each Petitioner's stock.

Petitioners World Trade Center Properties LLC, 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, 5 World Trade Center LLC, Silverstein WTC Mgmt. Co. LLC, and 7 World Trade Company L.P. have no parent corporation, and no publicly held company owns 10% or more of each Petitioner's stock.

Petitioners Transcontinental Insurance Company, Transportation Insurance Company, National Fire Insurance Company of Hartford and American Casualty Company of Reading, Pennsylvania are wholly-owned subsidiaries of petitioner Continental Casualty Company; Valley Forge Insurance Company is a wholly-owned subsidiary of petitioner American

Casualty Company of Reading, Pennsylvania; and petitioner Continental Casualty Company is a wholly-owned subsidiary of CNA Financial Corp., which is publicly traded.

Petitioner New York Marine and General Insurance Company is a subsidiary of NYMAGIC, Inc., which is publicly traded.

Petitioners Cantor Fitzgerald & Co., Cantor Fitzgerald Associates, L.P. (now BGC Capital Markets, L.P.), Cantor Fitzgerald Brokerage, L.P. (now Cantor CO2e, L.P.), Cantor Fitzgerald Europe, Cantor Fitzgerald International (now BGC International), Cantor Fitzgerald Partners (now BGC Securities), Cantor Fitzgerald Securities, Cantor Fitzgerald, L.P., Cantor Index Limited, CO2e.com, LLC (now Cantor CO2e, LLC), and Tradespark, L.P. are affiliated with BGC Partners, Inc. a public company. No other parents or public companies own 10% or more of the stock of any of the Cantor Fitzgerald petitioners.

eSpeed Government Securities, Inc., and eSpeed Securities, Inc., were privately held subsidiaries of Petitioner eSpeed, Inc., which was publicly traded. Subsequently, eSpeed, Inc. merged with BGC Partners and acquired more than ten percent (10%) ownership of the BGC entities, and is now BGC Partners, Inc. The entities formerly known as eSpeed Government Securities, Inc. (now eSpeed Brokerage, Inc.) and eSpeed Securities, Inc. (now Aqua Securities, L.P.), are privately held subsidiaries of BGC Partners, Inc, which is publicly traded.

Petitioners Port Authority Trans-Hudson Corporation and World Trade Center Retail LLC are subsidiaries of Petitioner Port Authority of New York and New Jersey, a public agency that receives no tax

revenues from any state or local jurisdiction and has no power to tax.

Petitioners Mayore Estates, LLC and 80 Lafayette Associates, LLC are privately held limited liability companies, and no publicly held company owns 10% or more of their stock.

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No. 08-640

IN THE
Supreme Court of the United States

FEDERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THE KINGDOM OF SAUDI ARABIA AND SAUDI HIGH COMMISSION

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QUESTION PRESENTED

Whether a plaintiff can use the "noncommercial torts" exception to sovereign immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(5), to sue a foreign state on allegations that it provided material support and resources for a terrorist act, when the U.S. government has *not* designated the foreign state as a state sponsor of terrorism and the plaintiff therefore cannot proceed under the FSIA's terrorism exception, *id.* § 1605A.

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European Convention on State Immunity, May 16, 1972, ETS No. 74, 11 I.L.M. 470, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm 29

National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (July 2004) 1, 7

Report of the International Law Commission on the work of its thirty-sixth session, 7 May – 27 July 1984, U.N. GAOR, 39th Sess., Supp. No. 10, U.N. Doc. A/39/10 (1984), *available at* http://untreaty.un.org/ilc/documentation/english/A_39_10.pdf 29

INTRODUCTION

Following an exhaustive and authoritative investigation, the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission") concluded that the Kingdom of Saudi Arabia had no role in the attacks of September 11, 2001. The 9/11 Commission found that Saudi Arabia did *not* provide financial or material assistance to the September 11 terrorists or their al Qaeda organization: "Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004) (the "9/11 Report"). In keeping with their practice throughout this litigation, petitioners quote (at 4) only the first portion of this sentence, as if that were the finding of the 9/11 Commission, while omitting the Commission's actual finding that there was no evidence implicating respondents in the funding of al Qaeda.

Petitioners in these consolidated cases have named Saudi Arabia – along with several senior government officials and the Saudi High Commission ("SHC"), which is a Saudi agency that conducts humanitarian relief efforts abroad – among the more than 200 individuals, non-profits, financial institutions, foreign officials, and sovereign states they accuse of complicity in the September 11 attacks. Petitioners allege in the most conclusory terms that Saudi Arabia, both directly and through various charity "fronts" supposedly acting on its behalf, provided funding and other support to al Qaeda, and thereby facilitated

that organization's growth into a terrorist group capable of perpetrating the attacks of September 11.

The Second Circuit correctly determined that these claims are not cognizable in a U.S. court. As a "foreign state" within the meaning of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Saudi Arabia, along with its agencies and instrumentalities, is immune from suit unless one of the FSIA's exceptions to immunity applies. Here, Saudi Arabia is alleged to have provided material support for terrorism, so, as the Second Circuit recognized, the relevant exception is the FSIA's terrorism exception. That exception, however, applies only when the U.S. Department of State has designated the defendant state as a state sponsor of terrorism. The State Department has never so designated Saudi Arabia. To the contrary, the State Department has identified Saudi Arabia as a crucial *ally*, emphasizing that the United States and Saudi Arabia are "united in the war against terror."[1] As the Second Circuit held, petitioners cannot avoid that critical fact – and thus force an ally of the United States into the extraordinary posture of defending itself in a U.S. court against claims that it sponsored an act of terrorism against the United States – merely by recasting their terrorism claim as one arising under the torts exception to sovereign immunity.

The Second Circuit's decision creates no conflict among the courts of appeals. As the Second Circuit noted, its decision is consistent with those of multiple other courts of appeals that have recognized that a

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[1] *E.g.*, U.S. Dep't of State, Press Briefing With Saudi Arabian Foreign Minister Prince Saud Al-Faisal (Mar. 19, 2004) (statement of then-Secretary Colin L. Powell), *available at* http://www.state.gov/secretary/former/powell/remarks/30623.htm.

plaintiff may not circumvent the limitations in a specific exception to sovereign immunity by recasting its allegations as arising under another exception. The Second Circuit's decision is also correct: the plain text of the FSIA's terrorism exception reflects Congress's considered judgment that subjecting a foreign sovereign to allegations that it sponsored an act of terrorism against the United States carries with it sensitive foreign policy implications and should thus be undertaken only with the express sanction of the State Department. As the Second Circuit held, permitting petitioners to circumvent that key procedural safeguard – merely by recasting their state-sponsor-of-terrorism claims as tort claims – would read the terrorism exception out of the FSIA, in conflict with settled principles of statutory interpretation. Finally, this case is a poor vehicle to address the question petitioners seek to raise. As the district court held below, petitioners cannot in any event satisfy the torts exception they seek to invoke. In this case, accordingly, the question whether they can use that exception to circumvent the limitations in the terrorism exception is purely academic.

STATEMENT OF THE CASE

A. Petitioners' Allegations Against Saudi Arabia and the SHC

1. The crux of petitioners' allegations against Saudi Arabia is that the Saudi government, acting through senior officials and various entities supposedly acting on Saudi Arabia's behalf, provided financial and material assistance to al Qaeda and thereby assisted that organization's "growth and development into a sophisticated global terrorist network" capable of perpetrating the attacks of September 11. *See* First Am. Compl. ¶ 398, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed Mar. 10, 2004) ("Compl."). The complaint alleges, for example, that Saudi Arabia provided al Qaeda with unspecified "financial, logisitcal [sic] and other support." *Id.* It further asserts, in equally conclusory terms, that Saudi Arabia "established, funded, managed, maintained, directed and controlled many of the ostensible charities and banks that operate within al Qaida's support infrastructure." *Id.* ¶ 399. And the complaint alleges, again without specification, that Saudi Arabia "appointed senior members of the al Qaida movement" to positions within charities that it supposedly controlled, thus "providing a cover for their terrorist activity." *Id.*[2]

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[2] Petitioners describe their complaint as including "exhaustive allegations and evidence of the Kingdom's rigid control of the operations and activities" of charities they characterize as having supported al Qaeda. Pet. 7. To support this characterization, they cite a laundry list of paragraphs from their complaint, the bulk of which use identical language to assert in conclusory terms that the Saudi government exercises control over various charities. *See, e.g.*, Compl. ¶¶ 85, 114, 131, 151, 168, 208 (using identical, conclusory language to assert that Saudi Arabia "controls and directs [the] operations," and

Petitioners also allege that French and U.S. government officials raised with Saudi officials their concern that Saudi charities were involved "in the sponsorship and funding of terrorist organizations." *Id.* ¶ 400. The complaint then contends that, despite international opposition, Saudi Arabia "continued to funnel enormous amounts of money and other resources to the charities supporting al Qaida's operations." *Id.* ¶ 401. Plaintiffs further assert, again without specification, that "the Kingdom . . . and members fo [sic] the Royal Family knew and intended that the funding and support funneled to al Qaida through the charities and banks would be used to attack U.S. interests." *Id.* ¶ 402.

Petitioners also seek to link Saudi Arabia to the September 11 attacks through support the Saudi government supposedly provided to the Taliban (which was at the time the *de facto* government of Afghanistan). *See id.* ¶¶ 403-407. Without that support, petitioners assert, al Qaeda would not have been able to grow into a network capable of conducting "large scale acts of terrorism on a global scale." *Id.* ¶ 409.

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provides "virtually all of [the] funding" for, six different charities that petitioners claim are al Qaeda "fronts"). None of the paragraphs that petitioners cite can accurately be characterized as including "exhaustive allegations" or "evidence." Petitioners properly decline to rely on the supposed evidence of Saudi control over charities that they submitted to the district court; respondents demonstrated to the court of appeals that this supposed "evidence" was in fact a collection of unsubstantiated, speculative assertions that in no way suggested that Saudi Arabia exercised control over the charity "fronts" that petitioners claim were responsible for funding al Qaeda. *See* Brief of Defendant-Appellee the Kingdom of Saudi Arabia at 47-51 & nn.14-15, *In re Terrorist Attacks on September 11, 2001*, Nos. 06-0319-CV(L) et al. (2d Cir. filed Jan. 5, 2007).

Petitioners do not allege any direct involvement by Saudi Arabia in the September 11 attacks, but rather assert without elaboration that those attacks were a "direct, intended and foreseeable product" of Saudi Arabia's purported support of al Qaeda. *Id.* ¶ 425.

The complaint also names as defendants the SHC and several other Saudi agencies that conduct humanitarian relief efforts in various parts of the world. Petitioners allege that each of those agencies provided funding and logistical support for al Qaeda. *See id.* ¶¶ 180-207.[3] Additional defendants include more than a half-dozen charities, including some organized and based in Saudi Arabia. *See id.* ¶¶ 84-179, 208-216. In contrast to the SHC and other agencies of the Saudi government named as defendants, these charities – which include, for example, the International Islamic Relief Organization and the Muslim World League – are not agencies or instrumentalities of Saudi Arabia, but rather are independent charities, some of which were based in Saudi Arabia and all of which are alleged to have "provided critical financial and logistical support to al Qaida." *E.g., id.* ¶¶ 128, 178.

2. Petitioners' claims against Saudi Arabia are directly rebutted by facts found by the U.S. government. As noted at the outset, the 9/11 Commission concluded that Saudi Arabia did *not* assist the September 11 terrorists. While not ruling out the possi-

[3] Petitioners admit that respondent the SHC has contributed more than $600 million to aid Bosnian Muslims impoverished by the recent civil war in Bosnia and Herzegovina (see Pet. App. 57a), but they also allege that $41 million collected by the SHC is unaccounted for (see Compl. ¶ 460) and leap to the conclusion that the SHC "has long acted as a fully integrated component of al Qaida's logistical and financial support infrastructure" (*id.* ¶ 182).

bility that some independent (non-sovereign) *charities* diverted funds to al Qaeda, the 9/11 Commission "found no evidence that the Saudi government as an institution or senior Saudi officials individually funded" al Qaeda. 9/11 Report at 171. The 9/11 Report further concluded that "we have seen no evidence that any foreign government – or foreign government official – supplied any funding" to the September 11 hijackers. *Id.* at 172.

The 9/11 Commission further stated that Saudi Arabia, together with the United States, is "locked in mortal combat with al Qaeda." *Id.* at 373. As far back as 1996, Osama bin Laden "condemned the Saudi monarchy for allowing the presence of [American troops] in a land with the sites most sacred to Islam." *Id.* at 48. Saudi Arabia itself thus became a target of al Qaeda because of its ties to the United States. Shortly thereafter, Saudi Arabia and the United States established a joint intelligence committee and worked together in an effort to stop al Qaeda. *See id.* at 115-22. As then-Secretary of State Powell remarked in 2004, the United States and Saudi Arabia are "united in the war against terror." *See supra* p. 2 & note 1.[4]

B. Proceedings Below

Saudi Arabia and the SHC each filed motions to dismiss asserting sovereign immunity under the FSIA. The district court granted both motions, and the Second Circuit, in a unanimous opinion, affirmed.

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[4] *See also* Office of the Press Secretary, *President Bush Discusses National Security, Homeland Security and the Freedom Agenda at U.S. Army War College* (Dec. 17, 2008) (statement of President George W. Bush) (describing Saudi Arabia as a "staunch ally in the war on terror"), *available at* http://www.whitehouse.gov/news/releases/2008/12/20081217-6.html.

1. With respect to Saudi Arabia's motion, the district court began by explaining that, "[u]nder the FSIA, a foreign state and its instrumentalities are presumed immune from United States courts' jurisdiction" and that "[t]he FSIA's exceptions to immunity provide the sole basis for obtaining subject matter jurisdiction over a foreign state and its instrumentalities." Pet. App. 122a. Because "[t]here [wa]s no dispute that the Kingdom of Saudi Arabia is a foreign state," *id.* at 165a, the court addressed the relevant FSIA exceptions to determine whether it could exercise jurisdiction.

The district court first addressed the FSIA's state-sponsor-of-terrorism exception, which provides for jurisdiction in terrorism cases against foreign states that the U.S. State Department has designated as "state sponsor[s] of terrorism." 28 U.S.C. § 1605A.[5] The court determined that this exception does not apply because Saudi Arabia "has not been designated a state sponsor of terrorism." Pet. App. 147a.

The district court also addressed the FSIA's "non-commercial torts" exception. *See* 28 U.S.C. § 1605(a)(5). Saudi Arabia contended that the torts exception does not apply to claims based on alleged support for terrorism. Construing it to apply to such claims, Saudi Arabia pointed out, would permit petitioners to make an end-run around the terrorism exception and the limits that Congress placed on that exception.

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[5] At the time this case was initiated, the state-sponsor-of-terrorism exception was codified at 28 U.S.C. § 1605(a)(7) (2000 & Supp. I 2001). During the pendency of the Second Circuit appeal, § 1605(a)(7) was repealed and replaced with 28 U.S.C. § 1605A. Consistent with the Second Circuit's decision and the petition, *see* Pet. App. 30a n.13, Pet. 2 n.1, respondents in this brief refer to § 1605A.

The court rejected that argument but nevertheless concluded that petitioners' claims do not fit within the torts exception.

The district court stressed that the torts exception does not establish jurisdiction over discretionary actions. *See* Pet. App. 167a; 28 U.S.C. § 1605(a)(5)(A). The court explained that petitioners' allegations with respect to Saudi Arabia "arise predominantly" from claims that the Saudi government "aided and abetted the terrorists" by supporting charities purportedly "under the Kingdom's control." Pet. App. 165a-166a (internal quotation marks omitted). The court observed that "conclusory . . . allegations" cannot support jurisdiction under the FSIA, and it concluded that Saudi Arabia's "treatment of and decisions to support Islamic charities are purely planning level 'decisions grounded in social, economic, and political policy'" and are therefore outside the scope of the torts exception. *Id.* at 167a (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)). Because petitioners could not satisfy the torts exception (or any other FSIA exception), the court granted Saudi Arabia's motion to dismiss.

The district court reached the same result with respect to the SHC. In contrast to petitioners' indiscriminate discussion of undifferentiated "charities" that they characterize as al Qaeda "fronts," *see* Pet. 4-7, the court carefully considered the evidence and allegations specifically relating to the SHC (which is the one Saudi entity among the many "charities" that petitioners address[4]).

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[4] Petitioners conflate the SHC, which is an agency of the Saudi government, with unnamed charity "fronts," which are

The district court first considered whether the SHC is an "organ, agency, or instrumentality" of Saudi Arabia and is therefore entitled to sovereign immunity under the FSIA. *See* Pet. App. 64a-69a; 28 U.S.C. § 1603(b). To resolve that question, the court gave "great weight" to affidavits submitted by the SHC regarding its status and mission. Pet. App.

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not. *See* Pet. 6-7. They assert, for example, that the SHC "admitted" that it is an agency and instrumentality of the Saudi government, and they further claim that "several" unidentified charities likewise "acknowledged in district court pleadings that they are instrumentalities of the Saudi Government." Pet. 7. As explained in the text, the SHC in fact *proved*, over the opposition of some petitioners, that it is an "agency or instrumentality" of the Saudi government and is therefore entitled to sovereign immunity under the FSIA. *See* 28 U.S.C. § 1603(b). Petitioners' reference to the "acknowledg[ment]" of "several" *other* charities, by contrast, refers to answers filed by two charities (the International Islamic Relief Organization ("IIRO") and the Muslim World League ("MWL")) in which those entities noted *petitioners' allegations* that the charities were instrumentalities of Saudi Arabia and, without admitting those allegations, pleaded in the alternative that, if petitioners were correct, the charities were entitled to sovereign immunity under the FSIA. *See* Def. MWL's Answer to First Am. Compl. at 66, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed July 30, 2004); Def. IIRO's Am. Answer to Pls.' First Am. Compl. at 66, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed Dec. 13, 2005). Saudi Arabia, however, has made clear that these entities are not instrumentalities of the Kingdom. *See* Reply in Support of Mot. To Dismiss of the Kingdom of Saudi Arabia at 2, *Federal Ins. Co. v. al Qaida*, Nos. 03CV6978 & 03CV8591 (S.D.N.Y. filed Oct. 15, 2004). Moreover, and contrary to petitioners' apparent understanding, even if these two entities were instrumentalities of Saudi Arabia, their conduct would not be attributable to the Kingdom (or the SHC). *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such").

65a (internal quotation marks omitted); *see Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (in FSIA context, "[w]hen the defendant has . . . challenged the factual basis of the court's jurisdiction, . . . the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss"). Relying on those affidavits, the court held that the SHC made a "prima facie showing that it is a foreign sovereign" and is therefore entitled to sovereign immunity: it was formed by order of the Saudi governing body, it provides Saudi Arabia's aid to Bosnia, it is governed by a Saudi official, and its employees are civil servants. Pet. App. 67a-68a.

Turning to the FSIA's exceptions, the district court concluded that the torts exception "is the only exception relevant to the allegations" against the SHC, and, as with Saudi Arabia itself, it further held that petitioners' allegations are insufficient to overcome discretionary-function immunity. *Id.* at 69a-70a, 72a-73a. Relying on "undisputed evidence" submitted by the SHC, the court held that the SHC's decisions regarding the distribution of humanitarian funds were discretionary and that it was guided by the Kingdom's policies regarding foreign aid in making funding determinations. *Id.* at 72a. The undisputed evidence on which the court relied included the declaration of Saud bin Mohammad Al-Roshood, the Director of the Executive Office of the SHC. *See* C.A. App. A2516-21. Mr. Al-Roshood submitted uncontradicted evidence that the SHC is a legitimate humanitarian organization and that, contrary to petitioners' wholly unsupported allegation that SHC funds were diverted to al Qaeda, Bosnian authorities

audited the disbursements of funds by the SHC in 1998, 1999, 2000, and 2001 and found nothing amiss. *See id.* at A2204, A2518-19, A2521. The court held that "SHC's alleged misuse of funds and/or inadequate record-keeping – even if it resulted in the funds going to terrorists – was the result of a discretionary function and cannot be the basis for overcoming SHC's immunity." Pet. App. 72a (quoting *Varig Airlines*, 467 U.S. at 814).

2. The Second Circuit, in a unanimous opinion authored by Chief Judge Jacobs, affirmed. Like the district court, the court of appeals began with the undisputed fact that Saudi Arabia (and its agencies and instrumentalities) is entitled to sovereign immunity unless one of the FSIA's exceptions applies. Pet. App. 12a. Noting that all of petitioners' allegations involve "providing material support to terrorists," the court emphasized that the FSIA's state-sponsor-of-terrorism exception "governs precisely those activities." *Id.* at 28a. That exception, however, includes a "key limitation": it is applicable only where the State Department has designated the defendant as a "state sponsor of terrorism." *Id.* at 31a. Because "[t]he State Department has never designated the Kingdom a state sponsor of terrorism . . . , the [t]errorism [e]xception is inapplicable here." *Id.*

The court of appeals then turned to the torts exception and explained that "to apply [that] [e]xception where the conduct alleged amounts to terrorism within the meaning of the [t]errorism [e]xception would evade and frustrate that key limitation on the [t]errorism [e]xception." *Id.* The torts exception, the court explained, was originally enacted in 1976 to cover personal injuries resulting from "'traffic accidents and other torts committed in the United

States, for which liability is imposed under domestic tort law.'" *Id.* at 27a (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40 (1989)). The terrorism exception, by contrast, specifically covers harms resulting from acts of terrorism, and it sets up "[a]n important procedural safeguard – that the foreign state be designated a state sponsor of terrorism" in order to be subject to suit in a U.S. court. *Id.* at 31a. "By definition," the court stressed, "the acts listed in the [t]errorism [e]xception are torts." *Id.* "If the [t]orts [e]xception covered terrorist acts and thus encompassed the conduct set forth in the [t]errorism [e]xception, there would be no need for plaintiffs ever to rely on the [t]errorism [e]xception when filing suit." *Id.* That result, in turn, would allow plaintiffs to bypass the strict "procedural safeguard" of the terrorism exception by suing a non-designated government entity or official under the torts exception, and would thus "read the statute in a way that would deprive the [t]errorism [e]xception (or its limitations) of meaning." *Id.* at 31a-32a.

The court of appeals noted that its decision – insofar as it refused to permit petitioners to circumvent the limitations in the terrorism exception by casting their claims as arising under the torts exception – was consistent with prior decisions of the Second Circuit and its "sister circuits," which "have repeatedly rejected efforts to shoehorn a claim properly brought under one exception into another." *Id.* at 32a (citing *Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1399 (5th Cir. 1985); *Alberti v. Empresa Nica-*

raguense De La Carne, 705 F.2d 250, 254 (7th Cir. 1983)).[7]

REASONS FOR DENYING THE PETITION

The Second Circuit's holding that petitioners cannot use the torts exception to circumvent the procedural safeguards of the FSIA's terrorism exception creates no conflict in the circuits and is correct. Even if that were not the case, the Court should deny certiorari because this case would be a poor vehicle to address the question, insofar as petitioners cannot in any event satisfy the torts exception that they attempt to invoke.

I. THE SECOND CIRCUIT'S CONCLUSION THAT PETITIONERS CANNOT PLEAD AROUND THE REQUIREMENTS OF THE TERRORISM EXCEPTION CREATES NO CONFLICT IN THE CIRCUITS

Petitioners' claims against respondents are based on the allegation that respondents "direct[ed] significant financial and logistical support to al Qaeda" and the theory that, as a result, respondents are culpable for the September 11 attacks. Pet. 4. As the Second Circuit held, the FSIA's state-sponsor-of-terrorism exception "governs precisely those activities," but it is unavailable here because Saudi Arabia has not been designated as a state sponsor of terrorism. Pet. App. 28a. The Second Circuit further held that petitioners cannot avoid that fact – and thereby circumvent the

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[7] The Second Circuit likewise affirmed the district court's conclusion that the SHC is an agency or instrumentality of Saudi Arabia and therefore entitled to sovereign immunity under the FSIA. *See* Pet. App. 22a-26a. Petitioners do not challenge that conclusion here; indeed, they pretend that the SHC's victory on this question was somehow an "admi[ssion]" against interest by the SHC. Pet. 7.

"key limitation" in the terrorism exception – by recasting their allegations as arising under the noncommercial torts exception. *Id.* at 31a. To do so would "read the statute in a way that would deprive the [t]errorism [e]xception (or its limitations) of meaning." *Id.* at 31a-32a. Contrary to petitioners' claims, that holding creates no conflict – in either result or methodology – with other courts of appeals.

Petitioners assert a conflict with the Ninth Circuit's decision in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), which they claim holds that the torts exception "expressly authorizes claims based on acts of terrorism in the United States." Pet. 22. Contrary to petitioners' characterization, however, *Liu* involved no allegations of terrorism. Rather, in *Liu*, an official in China's Defense Intelligence Bureau was alleged to have ordered two individuals to kill a U.S. resident. *See* 892 F.2d at 1422-23. Although petitioners assert that "[t]here can be no doubt" that such an allegation amounts to a terrorism claim arising under the terrorism exception, Pet. 22 n.10, the court of appeals did not view it that way. On the contrary, the Ninth Circuit's discussion of the allegations at issue in *Liu* includes no reference to terrorism, and indeed the terrorism exception (the original version of which was added to the FSIA in 1996) did not even exist at the time *Liu* was decided. The *Liu* court thus had no occasion to consider the question the Second Circuit addressed – *i.e.*, whether a plaintiff can use the torts exception to plead around limitations in the terrorism exception. There is therefore no reason to believe this case would have come out differently had it been litigated in the Ninth Circuit, and thus no basis for this Court's intervention.

Petitioners' claim of a conflict between the Second Circuit's decision and the federal district court for the District of Columbia is likewise unavailing. *See* Pet. 22-23. In *Burnett v. Al Baraka Investment & Development Corp.*, 292 F. Supp. 2d 9 (D.D.C. 2003), the federal district court for the District of Columbia ruled, consistent with the Second Circuit in this case, that it would do violence to the FSIA's statutory scheme to permit a plaintiff to proceed under the torts exception in a case alleging the "provision of material support or resources" in support of a terrorist act, where it is the terrorism exception that specifically provides a cause of action for such activity. *See id.* at 20 & n.5.

Petitioners ignore the *Burnett* decision – which arose in this very case, before the Judicial Panel on Multidistrict Litigation transferred the case to the Southern District of New York – and point instead to a recent interlocutory ruling, now on appeal, in which a different federal district judge for the District of Columbia concluded, without acknowledging *Burnett* or the Second Circuit's decision in this case, that a complaint alleging terrorist activities by Afghanistan might be able to go forward under the torts exception, depending on the evidence the plaintiff is able to adduce. *See* Pet. 22-23 (citing *Doe v. bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008), *appeal pending*, No. 08-7117 (D.C. Cir.)). At most, petitioners have identified tension between two decisions in a single federal district court, not a circuit split worthy of this Court's attention.[8]

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[8] Petitioners' reliance (at 23) on the D.C. district court's decision in *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), fails for the same reason as does their reliance on the Ninth Circuit's decision in *Liu* – neither case involved claims

Nor is the Second Circuit's decision in conflict with the D.C. Circuit's decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88 (D.C. Cir. 2002), which the Second Circuit in fact quoted in support of its decision. *See* Pet. 23-24; *compare* Pet. App. 31a. Like this case, and unlike *Liu*, *Price* did involve a terrorism claim – there, plaintiffs alleged hostage taking and torture. The key difference in *Price*, however, was that the allegations were leveled against Libya, which had been designated as a state sponsor of terrorism and thus could be sued under the terrorism exception. *See* 294 F.3d at 89. *Price* thus did not address whether plaintiffs could plead around the limitations in the terrorism exception by invoking the torts exception – unlike the plaintiffs here, the plaintiffs in *Price* had no need to circumvent the terrorism exception. Rather, the court in *Price* examined only (i) whether the complaint in that case stated a claim for hostage taking and torture under the terrorism exception as it was codified at the time, and (ii) whether Libya, as a foreign state, could claim that it was not subject to personal jurisdiction. *See id.* at 85.[9] As in *Liu*, the

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that the defendants engaged in or supported terrorist acts, and thus neither court had occasion to address the issue resolved by the Second Circuit. The sentence from *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998), on which petitioners rely (at 23) is both dictum and incorrect: it reads *Liu* and *Letelier* as involving "state-sponsored terrorist acts," when the decisions themselves make no such suggestion.

[9] The court in *Price* held that the complaint did not adequately allege hostage taking and torture (though it remanded to permit the plaintiff to amend as to the latter), *see* 294 F.3d at 91-95, and it further held that Libya is not a "person" within the meaning of the Due Process Clause and that the Constitution therefore did not pose an obstacle to the lower court's exercise of personal jurisdiction, *see id.* at 95-100.

D.C. Circuit had no occasion to determine whether a plaintiff can circumvent the limitations in the terrorism exception by invoking the torts exception.

Petitioners highlight (and characterize as a "holding") a single sentence from the background section of *Price* in which the court stated that, "[u]nder the original FSIA, . . . terrorism, torture, and hostage taking committed abroad were immunized forms of state activity." *Id.* at 88; *see* Pet. 23. Petitioners infer from that statement that the FSIA's terrorism exception – which they say was intended to provide a remedy for acts of terrorism where none previously existed – is confined to terrorist acts occurring outside U.S. borders, while terrorism committed inside U.S. borders is and always has been covered by the torts exception. *See* Pet. 23-24. But the D.C. Circuit held no such thing, and for good reason.

In enacting the terrorism exception, Congress included no geographic restrictions on the scope of that exception that would suggest it applies only if the terrorist act occurs outside the United States. Rather, Congress, far from focusing on geography, "sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future." *Price*, 294 F.3d at 88-89. Indeed, quoting *Price* itself, petitioners concede that "'the only required link between the defendant nation and the territory of the United States is the nationality of the claimant,'" *not* the location of the alleged act. Pet. 24 (quoting *Price*, 294 F.3d at 90).

Petitioners also claim a conflict with *Price* insofar as the Second Circuit recognized that forcing an ally to stand trial on allegations that it sponsored a

terrorist attack on U.S. soil implicates "separation of powers" concerns and "diplomatic sensitivities." Pet. 24. In petitioners' view, *Price* stands for the proposition that such concerns and sensitivities arise only where a foreign state is accused of "*extraterritorial*" or "*overseas*" acts – *i.e.*, acts undertaken outside U.S. borders. *Id.* (citing *Price*, 294 F.3d at 89).

This claim is doubly flawed. First, the Second Circuit's decision rests primarily on pure statutory interpretation, not on the "separation of powers" concerns and "diplomatic sensitivities" that petitioners contend were highlighted in *Price*. The court below stressed that petitioners' allegations fit squarely under the terrorism exception, and it observed that, "[b]y definition, the acts listed in the [t]errorism [e]xception are torts." Pet. App. 31a. "If the [t]orts [e]xception covered terrorist acts," the court concluded, "there would be no need for plaintiffs ever to rely on the [t]errorism [e]xception when filing suit." *Id.* The court thus "decline[d] to read the statute in a way that would deprive the [t]errorism [e]xception (or its limitations) of meaning," *id.* at 31a-32a, and it drew support for its decision from the "'cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute,'" *id.* at 32a (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)), as well as from numerous cases that have "rejected efforts to shoehorn a claim properly brought under one exception into another," *id.* (citing cases from the Second, Fifth, Seventh, and Ninth Circuits).

Second, and in any event, this case presents the very "separation of powers" concerns and "diplomatic sensitivities" that, according to petitioners, the D.C. Circuit highlighted in *Price*. Petitioners take the

view that, under *Price*, such concerns and sensitivities are implicated only where a plaintiff sues a foreign state for acts undertaken outside the United States. But *all* of the conduct that Saudi Arabia, along with its officials and instrumentalities, is alleged to have undertaken in this case – its supposed provision of funding and logistical support of al Qaeda, its alleged support of the Taliban, and its purported funding and control of various charities – took place outside U.S. borders; indeed, the bulk of that supposed conduct by definition took place in Saudi Arabia itself. Thus, even if *Price* supported petitioners' distinction between acts undertaken within and outside U.S. borders – which in fact it does not – the case would not help petitioners here, because the very "separation of powers" concerns and "diplomatic sensitivities" that petitioners acknowledge are implicated by suing a foreign state for actions allegedly taken "*overseas*" are present here.

Finally, petitioners claim "tension" between the Second Circuit's reading of the language "not otherwise covered by this chapter" in the terrorism exception, *see* Pet. App. 32a-33a (citing § 1605A(a)(1)), and other circuits' reading of the language "not otherwise encompassed in paragraph (2)" (the commercial activities exception) in the noncommercial torts exception (§ 1605(a)(5)). *See* Pet. 25-26. There is no such tension. The Second Circuit read the clause "not otherwise covered by this chapter" to mean that the terrorism exception "stands alone," and it elaborated that, "[i]f acts of terrorism are considered torts for the purposes of the [t]orts [e]xception, then any claim that could be brought under the [t]errorism [e]xception could also be brought under the [t]orts [e]xception." Pet. App. 33a. "If this were so," the court continued,

"the [t]errorism [e]xception would be drained of all force because every potential case would be 'otherwise covered by this chapter' – namely, the [t]orts [e]xception." *Id.*

Contrary to petitioners' assertion, that explanation – of a statutory clause that was first enacted in January 2008 as part of the new § 1605A – has nothing to do with the different interplay, based on different statutory language, between the noncommercial torts exception and the commercial activities exception that is the subject of the cases that petitioners cite. *See, e.g., El-Hadad v. United Arab Emirates*, 216 F.3d 29, 35 (D.C. Cir. 2000) (concluding, in part based on the language "not otherwise encompassed in paragraph (2)" in § 1605(a)(5), that a claim arising under the "commercial activities" exception (§ 1605(a)(2)) was not subject to a limitation in the "noncommercial torts" exception (§ 1605(a)(5)). Indeed, one of the cases on which petitioners rely in this respect cites a Second Circuit case to support its conclusion that personal injuries arising out of commercial activities are cognizable under the "commercial activities" exception rather than the "noncommercial torts" exception, thus confirming that there is no conflict between or among the circuits on this point. *See Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544 n.13 (11th Cir. 1993) (citing *Martin v. Republic of South Africa*, 836 F.2d 91, 93 (2d Cir. 1987)).

II. THE SECOND CIRCUIT CORRECTLY DECLINED TO PERMIT PETITIONERS TO PLEAD AROUND THE FSIA'S TERRORISM EXCEPTION BY INVOKING THE TORTS EXCEPTION

The Second Circuit's decision, apart from creating no conflict with other courts of appeals, is also correct. "The primary purpose of the 'tortious act or omission' exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1525 (D.C. Cir. 1984) (Scalia, J.) (citing H.R. Rep. No. 94-1487, at 20-21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6619-20); *see* Pet. App. 27a-28a. As the Second Circuit recognized, to construe that exception to reach allegations that a foreign state provided material support to a terrorist group would expand the provision far beyond its intended scope and permit petitioners to plead around the terrorism exception and its procedural safeguards. That result, in turn, would render the terrorism exception a dead letter, in conflict with basic principles of statutory interpretation.

The limitations in the terrorism exception are clearly defined: plaintiffs may pursue an action against a foreign state for providing "material support or resources" to terrorist groups, but only where (i) the plaintiff (or the victim) is a U.S. national, member of the armed forces, or a U.S. government employee, (ii) the plaintiff has afforded the defendant foreign state the opportunity to arbitrate (if the terrorist act occurred in the foreign state), and (iii) the defendant foreign state has been designated a state sponsor

of terrorism. 28 U.S.C. § 1605A. These limitations are critical to the proper implementation of the FSIA. As the Second Circuit stressed, the Executive Branch "'resisted'" passage of a terrorism exception, "fear[ing] that such an amendment to the FSIA 'might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States.'" Pet. App. 31a (quoting *Price*, 294 F.3d at 89). "The resulting provision bore 'notable features which reveal the delicate legislative compromise out of which it was born,' the primary one being that it applie[s] only to designated state sponsors of terrorism." *Id.* (same) (internal citation omitted).

Petitioners, however, seek to disregard that limitation and proceed against Saudi Arabia under the torts exception, even though Saudi Arabia has not been designated as a state sponsor of terrorism. As the Second Circuit recognized, permitting petitioners to do so "would deprive the [t]errorism [e]xception ([and] its limitations) of meaning." *Id.* at 31a-32a. In amending the FSIA to add the terrorism exception, Congress balanced the interest in providing a remedy to victims of terrorist acts against the profound policy implications of adjudicating claims in a U.S. court against a foreign state based on accusations that the foreign state supported a terrorist act. Congress struck that balance by authorizing suits in specifically defined circumstances, and *only* where the State Department has designated the defendant foreign state as a state sponsor of terrorism. "By definition, the acts listed in the [t]errorism [e]xception are torts." *Id.* at 31a. To allow petitioners to pursue their terrorism claims under the torts exception – which petitioners invoke only because

they cannot proceed against Saudi Arabia under the terrorism exception – would "drain[]" the terrorism exception "of all force." *Id.* at 33a.[10]

In refusing to permit that result, the Second Circuit adhered to settled principles of statutory interpretation. This Court has long recognized that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). Indeed, as the Second Circuit emphasized, in the FSIA context in particular, the federal courts of appeals have uniformly and repeatedly "rejected efforts to shoehorn a claim properly brought under one exception into another." Pet. App. 32a (citing *Garb*, 440 F.3d at 588; *Chuidian*, 912 F.2d at 1106; *de Sanchez*, 770 F.2d at 1399; *Alberti*, 705 F.2d at 254); *see also Cabiri v. Government of Ghana*, 165 F.3d 193, 200 (2d Cir. 1999) (rejecting plaintiffs' "effort to plead around" an exclusion from the torts exception by recasting claim arising out of misrepresentation as the intentional infliction of emotional distress). Moreover, courts "must give effect, if possible, to every clause and word of a statute," *Williams*, 529 U.S. at 404 (internal quotation marks omitted), and "a specific statute . . . controls over a general provision . . . , particularly when the two are interrelated and closely positioned," *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam).

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[10] Furthermore, whereas the terrorism exception authorizes actions against state sponsors of terrorism for the "provision of material support or resources" in support of a terrorist act, the noncommercial torts exception includes no such language. *See Burnett*, 292 F. Supp. 2d at 20 & n.5. Congress's omission of the "provision of material support or resources" as an act giving rise to liability under § 1605(a)(5) "should be treated as intentional." *Id.*

By refusing to permit petitioners to "shoehorn" their terrorism claim into the torts exception through artful pleading, the Second Circuit ensured that the specific safeguards Congress built into the terrorism exception would have meaning, consistent with the language and structure of the statute.

Petitioners do not appear to dispute the Second Circuit's reasoning that, *if* the terrorism exception applies to their allegations, they can proceed against Saudi Arabia (if at all) only under that exception, and not under the torts exception. Instead, petitioners claim that the terrorism exception does not apply to their allegations, because that exception was "meant to authorize claims for harm caused principally *outside* the United States." Pet. 2. But, as noted above, and contrary to petitioners' assertion, the language of the terrorism exception is in no way confined to terrorist acts occurring outside the United States. On the contrary, the exception broadly applies in cases "in which money damages are sought against a foreign state for personal injury or death that was caused by" a series of terrorist acts "or the provision of material support or resources for such an act," 28 U.S.C. § 1605A(a)(1). In fact, as noted above, petitioners acknowledge that "'the only required link between the defendant nation and the territory of the United States is the nationality of the claimant,'" not the location of the alleged act. Pet. 24 (quoting *Price*, 294 F.3d at 90). Furthermore, the statute includes a mandatory arbitration requirement that applies only if "the act occurred in the foreign state against which the claim has been brought," 28 U.S.C. § 1605A(a)(2)(A)(iii), making clear that Congress understood how to confine the geographic coverage of the terrorism exception where it desired that result.

Petitioners themselves are proceeding in this very litigation pursuant to the terrorism exception against those defendants that have been designated as state sponsors of terrorism,[11] confirming their understanding that the terrorism exception does in fact cover their claims in this case.

Petitioners also complain that, if terrorism claims against foreign states can be brought only under the terrorism exception, "only the handful of countries designated as state sponsors of terrorism and their agencies can be sued for supporting acts of terrorism undertaken in the United States." Pet. 20. That fact, however, reflects the FSIA's "delicate legislative compromise," *Price*, 294 F.3d at 89 – *i.e.*, Congress's decision to create an Executive Branch check on actions in U.S. courts accusing foreign states of supporting terrorism against U.S. nationals. Moreover, petitioners ignore that the terrorism exception permits plaintiffs to proceed against foreign states that are designated as state sponsors of terrorism *after* the act takes place, in the event the Executive Branch determines that the foreign state had a hand in the act in question. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (authorizing actions against foreign states "designated [as a state sponsor of terrorism] as a result of such act"). Thus, if the U.S. government had found credi-

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[11] *See, e.g.*, Third Am. Compl. ¶¶ 17-18, *O'Neill v. Republic of Iraq*, No. 04CV1076 (S.D.N.Y. filed May 25, 2005) (asserting that terrorism exception gives court jurisdiction over Iran and Iraq); First Am. Compl. ¶ 47, *New York Marine & Gen. Ins. Co.*, No. 04CV6105 (S.D.N.Y. filed Dec. 23, 2004) (claiming jurisdiction over, *inter alia*, Iran, Iraq, Sudan, and Syria); Pls.' Mot. for J. by Default Against Sovereign Defs. at 1 & Exh. H ¶ 4, *Havlish v. Bin-Laden*, No. 03CV9848 (S.D.N.Y. filed Aug. 29, 2008) (seeking default judgment against Iran and its instrumentalities; asserting liability based on terrorism exception).

ble evidence to support petitioners' allegations that Saudi Arabia was complicit in the attacks of September 11 and had designated Saudi Arabia as a state sponsor of terrorism as a result, petitioners would have been able to pursue their claims in a U.S. court. Of course, as explained above, the 9/11 Commission found the opposite, and the State Department, far from designating Saudi Arabia as a state sponsor of terrorism, has identified Saudi Arabia as a key ally in the war on terror.

III. BECAUSE PETITIONERS CANNOT SATISFY THE TORTS EXCEPTION, THIS CASE IS AN UNSUITABLE VEHICLE TO ADDRESS WHETHER PETITIONERS CAN USE THAT EXCEPTION TO CIRCUMVENT THE TERRORISM EXCEPTION

Finally, and in all events, this case is a poor vehicle to address whether a plaintiff accusing a foreign state of providing material support for terrorism can circumvent the FSIA's terrorism exception by invoking the torts exception instead. That is because, as the district court held below, petitioners cannot satisfy the torts exception. As a result, the question petitioners seek to raise is purely academic.

A. The torts exception is inapplicable here, first, because the actions Saudi Arabia and the SHC supposedly took to support al Qaeda all took place outside the United States. To fall within the torts exception, the allegedly tortious activity itself, not just the injury that results from it, must occur in the United States.

Two D.C. Circuit opinions, including one by then-Judge Scalia, are express on this point, and the Sixth Circuit likewise agrees. *See Asociacion de Reclamantes*, 735 F.2d at 1524 (Scalia, J.); *Persinger v. Islamic*

Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984); *O'Bryan v. Holy See*, Nos. 07-5078 & 07-5163, 2008 WL 4964143, at *13, *16 (6th Cir. Nov. 24, 2008). As the D.C. Circuit explained, although the text of the torts exception is "ambiguous on this point," the ambiguity "goes no deeper than the surface of the text, . . . for the briefest consideration of the purposes of the statute shows that . . . both the tort and the injury must occur in the United States." *Persinger*, 729 F.2d at 840. In enacting the torts exception, "Congress' principal concern was with torts committed in this country" – as noted above, primarily "'traffic accidents.'" *Id.* at 840, 842 (quoting H.R. Rep. No. 94-1487, at 20-21, *reprinted in* 1976 U.S.C.C.A.N. at 6619-20); *see O'Bryan*, 2008 WL 4964143, at *13. By contrast, "[i]f Congress had meant to remove sovereign immunity for governments acting on their own territory, with all of the potential for international discord and for foreign government retaliation that that involves, it is hardly likely that Congress would have ignored those topics and discussed instead automobile accidents in this country." *Persinger*, 729 F.2d at 841.[12] Moreover, limiting the torts exception to acts occurring in the United States aligns with "codifications by other nation-states and international organizations – with which Congress sought to be consistent" and which "have provided that a state loses its sovereign immunity for tortious acts only

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[12] *Cf. Boim v. Holy Land Found. for Relief & Dev.*, Nos. 05-1815 et al., 2008 WL 5071758, at *3 (7th Cir. Dec. 3, 2008) (en banc) ("Congress has the power to impose liability for acts that occur abroad but have effects within the United States, but it must make the extraterritorial scope of a statute clear.") (citing, *inter alia*, *Small v. United States*, 544 U.S. 385, 388-89 (2005); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)) (internal citation omitted).

where they occur in the territory of the forum state." *Id.* at 840.[13]

This reading also accords with the statutory structure. Although the text of the torts exception is "susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly." *Asociacion de Reclamantes*, 735 F.2d at 1524. In the commercial activities exception, Congress withheld immunity for "a foreign sovereign's commercial activities 'outside the territory of the United States' having a 'direct effect' inside the United States." *Persinger*, 729 F.2d at 843. By contrast, "[a]ny mention of 'direct effect[s]' is noticeably lacking from the noncommercial tort exception." *Id.* (second alteration in original). "When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *Id.*

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[13] *See* European Convention on State Immunity, May 16, 1972, art. 11, ETS No. 74, 11 I.L.M. 470 (Article 11 provides that a state is not immune from action seeking redress for injury or damage to property "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred"), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/074.htm; *Report of the International Law Commission on the work of its thirty-sixth session, 7 May - 27 July 1984*, U.N. GAOR, 39th Sess., Supp. No. 10, at 62, 66-67, U.N. Doc. A/39/10 (1984) (provisionally adopting similar article; emphasizing goal of excluding actions taken in one state that cause injury in forum state and noting importance of that exclusion to principle of *lex loci delicti commissi*), *available at* http://untreaty.un.org/ile/documentation/english/A_39_10.pdf

Applied here, that inference compels the conclusion that Congress did not intend the torts exception to vitiate sovereign immunity for acts undertaken by foreign states outside the United States. *See id.* Yet petitioners would use that exception to attempt to hold Saudi Arabia and its officials and instrumentalities liable on the basis of activities supposedly undertaken outside the United States (primarily in Saudi Arabia). Because such allegations are not cognizable under the torts exception, the Court could affirm the judgment of the Second Circuit without reaching the issue that petitioners seek to present.

B. The torts exception is also inapplicable here because, as the district court held below, the actions that Saudi Arabia and its officials and instrumentalities are alleged to have taken involve the exercise of discretion. *See* 28 U.S.C. § 1605(a)(5)(A) (excluding from torts exception "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused").

The purpose of discretionary-function immunity is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814 (construing Federal Tort Claims Act's comparable discretionary-function limitation, on which the FSIA's provision was modeled). Petitioners' claims against Saudi Arabia are based primarily on contributions and other support the Saudi government is alleged to have provided to Islamic charities that in turn are alleged to have funded al Qaeda. But the Saudi government's decisions to support Islamic charities, and its determination of which charities to support,

are integral aspects of Saudi Arabia's leadership role in the Islamic world. As the district court recognized, those decisions are accordingly imbued with social and political policy dimensions and are thus immune from challenge under the FSIA. *See* Pet. App. 167a (Saudi Arabia's "treatment of and decisions to support Islamic charities are purely planning level 'decisions grounded in social, economic, and political policy'" and are accordingly immune from suit under discretionary-function immunity) (quoting *Varig Airlines*, 467 U.S. at 814).

The same is true with respect to petitioners' allegation that Saudi Arabia facilitated the growth and development of al Qaeda through alleged links to the Taliban. According to petitioners, Saudi Arabia "extended formal diplomatic relations to the Taliban, and provided funding and logistical support to sustain the regime," knowing and intending "that the financial and logistical support it provided to the Taliban would materially benefit al Qaida." Compl. ¶¶ 406-407. As one court has already held, it is "nearly self-evident," *Burnett*, 292 F. Supp. 2d at 20, that such alleged acts implicate official discretion in carrying out the foreign relations and international security policies of Saudi Arabia and are thus not subject to attack through a tort suit.

The SHC's use of funds is likewise discretionary. As the district court held, the "undisputed evidence" established that the SHC's decisions regarding the distribution of humanitarian funds were discretionary and influenced by Saudi Arabia's policies toward Bosnia-Herzegovina. Pet. App. 72a. The SHC's decision-making falls squarely within the discretionary-function exception and cannot be the basis for a tort claim.

Because petitioners cannot satisfy the FSIA's torts exception in any event – both because the torts exception applies only where the challenged actions occurred in the United States and because it excludes discretionary activity – there would be no point in granting certiorari in this case to review the question whether petitioners can use that exception to circumvent the limitations in the terrorism exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

FEDERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT HIS ROYAL HIGHNESS PRINCE TURKI AL-FAISAL BIN ABDULAZIZ AL-SAUD

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QUESTIONS PRESENTED*

1. Whether a high-ranking foreign official sued in U.S. courts for acts undertaken in an official capacity in furtherance of a foreign sovereign's national and foreign-policy objectives is entitled to sovereign immunity.

2. Whether a plaintiff can use the "noncommercial torts" exception to sovereign immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(5), to sue a high-ranking official of a foreign state on allegations that the official, acting in his official capacity, provided material support and resources for a terrorist act, when the U.S. government has *not* designated the foreign state as a state sponsor of terrorism and the plaintiff therefore cannot proceed under the FSIA's terrorism exception, *id.* § 1605A.

3. Whether allegations that a foreign person donated money to a foreign charity allegedly knowing that the money would be diverted to al Qaeda represent conduct expressly aimed at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction over the person.

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* This Brief in Opposition addresses only the first and third questions presented in the petition. For the reasons set forth in the Brief in Opposition of the Kingdom of Saudi Arabia and the Saudi High Commission, this Court's review is also not warranted on question two.

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INTRODUCTION

In these consolidated actions, His Royal Highness Prince Turki Al-Faisal bin Abdulaziz Al-Saud ("Prince Turki") stands accused of causing the terrorist attacks of September 11, 2001, through actions taken in his official capacity as Director of Saudi Arabia's Department of General Intelligence ("DGI"). Petitioners claim that, in that capacity, Prince Turki brokered an alleged deal with the Taliban not to seek the extradition of Osama bin Laden in exchange for bin Laden's agreement not to direct attacks at Saudi Arabia, and they further assert that Prince Turki provided unspecified support and resources to al Qaeda.

These allegations are fabricated. Uncontroverted evidence, including Prince Turki's sworn declaration and findings by the United States government, refute petitioners' claims and indeed make clear that Prince Turki has spent much of his career combating terrorism in general and al Qaeda in particular. Despite repeated invitations and opportunities – and despite settled law requiring plaintiffs seeking to vitiate a defendant's claim of sovereign immunity to come forward with evidence establishing jurisdiction – petitioners have failed to counter this evidence or otherwise to substantiate their allegations in any respect.

In the decision below, the Second Circuit became the third court to review petitioners' allegations against Prince Turki, and the third to conclude that petitioners' claims are legally insufficient and must be dismissed. The petition does nothing to call that decision into question or to suggest that further review by this Court would do anything other than unnecessarily delay the final dismissal of defamatory allegations that have now been pending against Prince Turki for six years.

The Second Circuit's conclusion that the Foreign Sovereign Immunities Act of 1976 ("FSIA") applies to individuals sued in an official capacity creates no conflict among the courts of appeals. Five (now six) federal courts of appeals and countless district courts have held that the FSIA applies to foreign officials sued for official-capacity acts. The decision of the Seventh Circuit on which petitioners rely does not present a conflict worthy of this Court's attention: that decision, which this Court refused to review despite the presence of the same supposed conflict petitioners identify here, appears to have rested on the ground that the acts in question were not undertaken in the defendant's official capacity and thus did not resolve the issue presented here. Even if it had, moreover, the Seventh Circuit's decision is subject to revisiting in light of recent amendments to the FSIA that, as the Second Circuit recognized below, confirm that the statute applies to individuals. Review is also unnecessary because the Second Circuit's decision is correct: the text, history, and purposes of the FSIA establish that the statute applies to foreign officials sued in an official capacity.[1] Finally, and in all events, this case is an unsuitable vehicle to address the issue: whether immunity for individuals rests in the FSIA, the common law, or both is irrelevant to the outcome. In this case – where petitioners seek to hold liable the head of the Department of General Intelligence of a U.S. ally for acts taken

[1] Indeed, notwithstanding their position in this Court, the *Federal Insurance* plaintiffs have long acknowledged that the FSIA governs claims against "Prince Turki" and others "to the extent" they are sued for "act[s] in their capacities as officials of the Kingdom." Brief of *Federal Insurance* Plaintiffs-Appellants at 1 n.1, *In re Terrorist Attacks on September 11, 2001*, Nos. 06-0319-CV(L) et al. (2d Cir. filed Jan. 5, 2007).

in his official capacity – Prince Turki is entitled to sovereign immunity whatever its source.

With respect to the scant allegations against Prince Turki in his personal capacity (allegations made only by the *Federal Insurance* plaintiffs), review of the Second Circuit's holding that U.S. courts lack personal jurisdiction is equally unwarranted. Applying settled principles, the Second Circuit correctly concluded that petitioners failed to allege that Prince Turki aimed conduct at the United States or U.S. residents. Petitioners' disagreement with the court of appeals' application of settled legal principles provides no ground for this Court's review. Beyond that, there is no conflict among the courts of appeals on this issue, and this case would in any event be an exceptionally poor vehicle to resolve any such conflict: petitioners' conclusory allegations against Prince Turki fall short under any legal standard.

STATEMENT OF THE CASE

1. Petitioners' Allegations

The bulk of petitioners' allegations against Prince Turki involve conduct allegedly undertaken as head of "Saudi Arabia's general intelligence service, the Istakhbarat [or the DGI]." First Am. Compl. ¶ 445, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed Mar. 10, 2004) ("Compl."). Petitioners generally maintain that, in that official capacity, Prince Turki "provided material support and resources to al Qaida" and that, under Prince Turki's direction, the DGI provided "financial aid and material support to the Taliban," which in turn was "supportive" of al Qaeda. *Id.* ¶¶ 446-447.

To support these generic claims, petitioners focus on alleged meetings between Prince Turki and Osama

bin Laden and the Taliban. Petitioners assert, for example, that "Prince Turki met personally with bin Laden at least five times while in Pakistan and Afghanistan during the mid-eighties to mid-nineties. Prince Turki also had meetings with the Taliban in 1998 and 1999." Third Am. Compl. ¶ 257, *Ashton v. al Qaeda*, Nos. 02CV6977 et al. (S.D.N.Y. filed Sept. 5, 2003). Petitioners claim that Prince Turki first met bin Laden at the Royal Embassy of Saudi Arabia in Islamabad, Pakistan, during the Soviet Union's occupation of Afghanistan in the 1980s. *See id.* ¶ 254. Petitioners allege that, around the time Iraq invaded Kuwait in 1990, bin Laden offered Prince Turki and His Royal Highness Prince Sultan bin Abdulaziz Al-Saud ("Prince Sultan"), then and now the Minister of Defense of Saudi Arabia, "engineering equipment available from his family's construction company," and that bin Laden also "suggested bolstering Saudi forces with Saudi militants who [he] was willing to recruit." *Id.* ¶¶ 253-254. Petitioners broadly assert, apparently based on these supposed interactions, that Prince Turki had an "ongoing relationship" with bin Laden and that he used that relationship to help arrange a meeting between Iraq's Ambassador to Turkey and bin Laden in 1998. *Id.* ¶¶ 254, 262.

Petitioners also claim that Prince Turki attended a meeting in July 1998 at which he is alleged to have promised oil and financial assistance to the Taliban (though not to al Qaeda). *See id.* ¶ 261. Petitioners allege that, "[a]fter the meeting, 400 new pick-up trucks arrived in Kandahar for the Taliban, still bearing Dubai license plates." *Id.* Petitioners also allege that, as part of an agreement supposedly reached at that meeting, "the Saudis would make

sure that no demands . . . for the extradition of terrorist individuals [were made], such as [for Osama] bin Laden, nor permit the closure of terrorist facilities and camps." *Id.*

Finally, with respect to personal-capacity allegations, the *Federal Insurance* complaint – alone among the nine complaints consolidated below – alleges that Prince Turki "made significant personal contributions to Saudi-based charities that he knew to be sponsors of al Qaida's global operations." Compl. ¶ 451. The *Federal Insurance* petitioners added this personal-capacity allegation only after their official-capacity claims were dismissed by the United States District Court for the District of Columbia. *See infra* pp. 8-9.

2. Prince Turki's Declaration and Petitioners' Failure To Come Forward with Evidence Supporting Their Allegations

a. Prince Turki moved to dismiss on the basis of sovereign immunity. In support of that claim – and consistent with established law providing that courts faced with a threshold claim of sovereign immunity may look behind the pleadings to assess the veracity of plaintiffs' allegations, *see, e.g., Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002); *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) – Prince Turki submitted a sworn declaration directly rebutting petitioners' claims. *See* Decl. of HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 02CV01616 (D.D.C. filed May 2, 2003) ("Decl."). In that declaration, Prince Turki expressly and unequivocally denied that he "encouraged, funded, or provided any form of material or other assistance – direct or indirect – to

enable Osama bin Laden and his Al-Qaeda network of terrorists to perpetrate the[] attacks" of September 11, 2001. *Id.* ¶ 4. Prince Turki's statement is corroborated by the findings of the congressionally chartered National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission"), which, after an exhaustive study, found that: "Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004) (the "9/11 Report").[2]

Prince Turki's declaration also establishes that all of his alleged acts would have been in an official capacity. Prince Turki served as Director of the DGI from September 1977 until August 2001. *See* Decl. ¶ 5. The DGI carries out functions similar in many respects to those of the U.S. Central Intelligence Agency ("CIA"), including collecting and analyzing foreign intelligence and carrying out foreign operations. *See id.* The activities of the DGI are an integral part of Saudi Arabia's foreign relations and national-security apparatus. *See id.* Among his other duties as head of the DGI, Prince Turki was actively involved in Saudi Arabia's efforts to combat international terrorism generally and the threat posed by Osama bin Laden and al Qaeda in particu-

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[2] The petition (at 4) quotes the first portion of the sentence excerpted in the text, as if to suggest that Saudi Arabia played a role in funding al Qaeda, while omitting the portion of the sentence in which the 9/11 Commission notes the absence of any evidence implicating the Saudi government or its officials in such funding.

lar. In so doing, he shared information and cooperated closely with other intelligence agencies, including the CIA. *See id.* ¶¶ 6, 10.

Prince Turki's declaration also establishes that, contrary to petitioners' unsupported allegations, Prince Turki's trips to Afghanistan in 1998 were for the purpose of conveying the official Saudi request that bin Laden be extradited to Saudi Arabia for trial. *See id.* ¶ 11. After Taliban leader Mullah Omar refused, Prince Turki recommended that Saudi Arabia withdraw its representative from Kabul and suspend diplomatic relations with the Taliban, which Saudi Arabia did in September 1998. *See id.* ¶ 13. In addition, Prince Turki's declaration refutes petitioners' naked allegations that, during these meetings in Afghanistan, Prince Turki reached an agreement with bin Laden or otherwise supported al Qaeda. *See id.* ¶¶ 15-16.

On these points as well, Prince Turki's declaration is confirmed by the 9/11 Report, which found that, after Saudi Arabia had disrupted an al Qaeda plot to attack U.S. forces in 1998, then-CIA Director George Tenet asked for the assistance of Saudi Arabia in capturing Osama bin Laden. *See* 9/11 Report at 115. In response, Saudi officials promised "an all-out secret effort to persuade the Taliban to expel Bin Ladin so that he could be sent to the United States or to another country for trial." *Id.* Prince Turki, as the Saudi "intelligence chief," was chosen as the "Kingdom's emissary" for that effort. *Id.* The 9/11 Report further documents that Prince Turki, "employing a mixture of possible incentives and threats, . . . received a commitment [from the Taliban] that Bin Ladin would be expelled, but Mullah Omar did not make good on this promise." *Id.*

Despite repeated invitations and opportunities to do so – and despite settled law that plaintiffs cannot merely rest on their allegations when sovereign immunity is at stake, *see, e.g.*, *Phoenix Consulting*, 216 F.3d at 40; *supra* p. 5 – at no point in the now six-year history of this litigation did petitioners submit any evidence contradicting Prince Turki's declaration or the corroborative findings of the 9/11 Commission.

b. Nor have petitioners ever provided specific allegations (much less evidence) to support their belated, conclusory claim that Prince Turki, in his personal capacity, made donations to charities that in turn provided material support and resources to al Qaeda. As noted, the *Federal Insurance* plaintiffs added that allegation only after their official-capacity claims against Prince Turki were dismissed. In view of Prince Turki's sworn denial and the fact that plaintiffs' allegations appeared to have been added without individual investigation, counsel for Prince Turki sent a letter to the *Federal Insurance* plaintiffs, invoking Federal Rule of Civil Procedure 11 and asking them to withdraw their allegations or to set forth a good-faith basis for them. The *Federal Insurance* plaintiffs never responded, much less have they set forth any basis for alleging that Prince Turki made donations to the charities named in the complaint.

3. District Court Proceedings

a. Prior to consolidation of these cases by the Judicial Panel on Multidistrict Litigation ("JPML"), the United States District Court for the District of Columbia dismissed official-capacity claims against Prince Turki. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 23 (D.D.C. 2003).

The *Burnett* court first held, consistent with five (now six) courts of appeals and countless district

courts, that foreign government officials are entitled to sovereign immunity under the FSIA. *See id.* at 14. The court further held that petitioners had alleged conduct that would have been taken in Prince Turki's "official capacity," and thus that he is presumptively entitled to immunity under the FSIA. *See id.* at 15. The court concluded that the noncommercial torts exception to immunity in 28 U.S.C. § 1605(a)(5) does not divest Prince Turki of that immunity for two principal reasons. First, petitioners' conclusory and attenuated allegations that Prince Turki caused terrorist attacks "would stretch the causation requirement of the noncommercial tort exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to terra incognita." *Id.* at 20 (citation omitted). Second, it is "nearly self-evident" that the conduct Prince Turki was alleged to have undertaken – in brokering a supposed "peace deal" with the Taliban, for example – is grounded in "'social, economic, and political policy'" and is therefore entitled to discretionary-function immunity under § 1605(a)(5)(A). *Id.* at 20-21 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

b. By order of the JPML, the *Burnett* case was subsequently transferred to, and consolidated with other cases in, the United States District Court for the Southern District of New York. That court, reviewing the decision in *Burnett* "de novo," Pet. App. 119a-120a n.2, reached the same bottom-line conclusions: the FSIA applies to foreign officials and requires the dismissal of all official-capacity claims against Prince Turki.

Consistent with the *Burnett* district court and the overwhelming weight of authority, the court first

held that immunity under the FSIA is "available to . . . Prince Turki, as the Director of Saudi Arabia's [DGI], to the extent [his] alleged actions were performed in [his] official capacit[y]." *Id.* at 136a. The court reasoned that a suit against a foreign official for official-capacity acts "is the practical equivalent of a suit against the sovereign directly." *Id.* at 135a (internal quotation marks omitted).

Turning to the FSIA's exceptions to immunity, the court first held, as relevant here, that the terrorism exception, 28 U.S.C. § 1605(a)(7) (repealed 2008), is not applicable because "[t]he parties agree that the Kingdom of Saudi Arabia has not been designated a state sponsor of terrorism." Pet. App. 147a. The court further held that petitioners' claims do not fit within the noncommercial torts exception to immunity, for the same reasons the *Burnett* court had identified. First, petitioners had failed to "plead[] facts to support an inference that [Prince Turki] [was] sufficiently close to the terrorists' illegal activities to satisfy" traditional standards for tort liability. *Id.* at 161a. Allegations that Prince Turki knowingly and intentionally supported al Qaeda are "conclus[ory]" and therefore insufficient to bring petitioners' claims within § 1605(a)(5). *Id.* at 162a. Second, the alleged conduct of Prince Turki plainly involves "judgments based on considerations of public policy" and thus are excluded by the discretionary-function immunity codified in § 1605(a)(5)(A). *Id.* at 164a.

Because the *Federal Insurance* plaintiffs had by this point added their allegation that Prince Turki donated money to charities in a personal capacity, the court also addressed whether it had personal jurisdiction over Prince Turki. After canvassing this Court's personal-jurisdiction precedents, the court

determined that petitioners had not alleged "specific facts" establishing "Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda," and thus that the court could not exercise personal jurisdiction over Prince Turki. *Id.* at 188a.

4. The Second Circuit's Decision

The Second Circuit unanimously affirmed. Two aspects of the decision are relevant here.

a. First, the Second Circuit "join[ed] [its] sister circuits in holding that an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the FSIA." Pet. App. 14a. The court noted that, apart from being consistent with decades of district court decisions, five other courts of appeals had reached this conclusion. *See id.* at 14a-15a.

Beginning with the text of the FSIA, the Second Circuit observed that the terms "agency or instrumentality," as used to define a "foreign state" subject to protection under the FSIA, "do not in their typical legal usage necessarily exclude individuals." *Id.* at 18a (internal quotation marks omitted). The court reasoned that "[t]he term 'agency' has a more abstract common meaning than a governmental bureau or office: an agency," the Second Circuit said, "is any thing or person through which action is accomplished." *Id.* at 19a-20a.

That understanding of "agency or instrumentality," the Second Circuit reasoned, "is consistent with the evident principle that the state cannot act except through individuals." *Id.* at 20a. The court noted that several analogous areas of law support the conclusion that the extension of sovereign immunity to

foreign states is naturally understood to encompass official-capacity acts: the act-of-state doctrine, for example, has long encompassed "acts committed by individual officials of foreign governments." *Id.* The court deemed the reasoning behind that principle relevant here: "'the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.'" *Id.* (quoting *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897)). The court also pointed to principles of domestic sovereign immunity, under which it has long been settled that "'official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Id.* (quoting *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

The Second Circuit drew additional support for its interpretation from the history of sovereign immunity and the purposes motivating enactment of the FSIA. In 1952, the U.S. Department of State issued the "Tate Letter," under which immunity applied to "the foreign sovereign's public acts," but it did "not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 15a (internal quotation marks omitted). Under that system of immunity, the State Department made binding suggestions of immunity. *See id.* at 15a-16a. As the Second Circuit explained, however, "by the 1970s, some in Congress had grown concerned that the Tate Letter system was leaving immunity decisions subject to diplomatic pressures rather than to the rule of law." *Id.* at 16a (internal quotation marks omitted). The FSIA, the court said, "largely codified the existing common law of sovereign immunity, with the notable exception

that it removed the role of the State Department in determining immunity." *Id.* (alterations and internal quotation marks omitted). Reading the FSIA as inapplicable to individuals (and leaving immunity determinations governed only by the common law), the court held, would "presumably" require courts "to give conclusive weight" to State Department suggestions of immunity, in conflict with "Congress's stated intent of removing the discretionary role of the State Department." *Id.* at 19a (internal quotation marks omitted).

Finally, the Second Circuit held that its "conclusion finds reinforcement in the new iteration of the [t]errorism [e]xception [to the FSIA], which makes special reference to the legal status of 'an official, employee or agent' of the foreign state." *Id.* at 21a (quoting 28 U.S.C. § 1605A(a)(1)). That provision, the court said, "evince[s] congressional recognition that claims against individual officials of a foreign government must be brought within the confines of the FSIA." *Id.* The FSIA amendment thus confirms that "Congress has long contemplated the FSIA's application to individuals." *Id.* at 22a.

Because the FSIA applies to all official-capacity claims against Prince Turki – and because, as discussed in more detail in the Brief in Opposition of the Kingdom of Saudi Arabia, no exception to FSIA immunity is applicable – the Second Circuit affirmed the dismissal of all official-capacity claims against Prince Turki. *See id.* at 26a-39a.

b. The Second Circuit also affirmed the dismissal of claims based on the allegation that Prince Turki, in his personal capacity, donated money to charities that in turn supported al Qaeda.

Quoting directly from precedent of this Court, the Second Circuit held that personal jurisdiction would be proper over Prince Turki and other defendants (collectively referred to as the "Four Princes" by the court) if the defendants were alleged to have "'purposefully directed' [their] activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." Pet. App. 40a (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985)). Under that standard, the court explained, "[m]ere foreseeability of harm in the forum state is insufficient." *Id.* at 40a-41a.

Applying those established rules, the Second Circuit held that petitioners' failure to allege that the Four Princes "expressly aimed" any conduct at the United States or U.S. residents precludes the exercise of personal jurisdiction. *Id.* at 43a (internal quotation marks omitted). After carefully reviewing all allegations, the court found that petitioners did "not allege that the Four Princes directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them." *Id.* at 42a. Instead, petitioners "rely on a causal chain" in which the Four Princes supposedly "supported Muslim charities knowing that their money would be diverted to al Qaeda." *Id.* at 42a-43a. Allegations that Prince Turki and others "[p]rovid[ed] indirect funding" to al Qaeda are, standing alone, insufficient to "constitute . . . intentional conduct" expressly aimed at the United States. *Id.* at 44a.

REASONS FOR DENYING THE PETITION

The Second Circuit's holding that the FSIA applies to foreign officials sued in an official capacity is supported by the overwhelming weight of authority. It does not, as petitioners argue, deepen an intractable conflict among the circuits. Nor do the views expressed by the United States in other cases warrant this Court's review: the position of the United States is that foreign government officials such as Prince Turki are entitled to *broader* immunity than that provided by the FSIA. Application of that broader immunity would necessarily yield the same result in this case. Indeed, the position of the United States establishes that this case is an inappropriate vehicle: Because Prince Turki is entitled to sovereign immunity regardless of its source, the question whether that immunity flows from the FSIA or the common law is irrelevant to the ultimate outcome of the case.

The Second Circuit's personal-jurisdiction holding likewise does not merit review. The court's core holding – that allegations that a foreign citizen donated money to foreign charities that then funneled money to al Qaeda does not establish jurisdiction in a U.S. court – hews closely to this Court's precedent. Nor does the court's fact-specific decision generate any conflict among the courts of appeals. Finally, petitioners' exaggerated claim that this decision undermines all terrorism-related litigation is unfounded.

I. CERTIORARI IS NOT WARRANTED ON QUESTION ONE

A. The Overwhelming View of Courts of Appeals Is That the FSIA Extends Immunity to Individuals Sued in an Official Capacity

1. Petitioners correctly acknowledge (at 14) that the Second Circuit joined "the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits" in holding that the FSIA extends immunity to foreign officials sued for acts taken in an official capacity. *See Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996). Petitioners are wrong, however, in asserting (at 20) that there is a "square conflict" among the courts of appeals that warrants this Court's attention.

In support of this purported conflict, petitioners rely primarily on the Seventh Circuit's decision in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006). But it is far from clear that *Enahoro* creates a genuine conflict. There, Nigerian citizens sought to use the FSIA to establish jurisdiction, in an Illinois district court, over a Nigerian general, whom the plaintiffs accused of acts of torture and killing in Nigeria. *See id.* at 879. The Seventh Circuit held that the FSIA did not apply to – and thus that the court lacked jurisdiction over – the defendant under the FSIA. *See id.* at 882-83. In so holding, the court did observe, as petitioners emphasize, that the FSIA's definition of foreign state "does not explicitly include individuals" and that, had

Congress intended to include individuals, "it would have done so in clear and unmistakable terms." *Id.* at 881-82. That language, however, appears to be dicta. The court appears to have decided the case on the narrower ground that, even if the FSIA applies to official-capacity acts, the conduct alleged did not satisfy that standard. The court emphasized, for example, that the "issue [of whether the FSIA applies to individuals] is a long way from being settled," stressing that "[t]he FSIA has been applied to individuals, but in those cases one thing is clear: the individual must have been acting in [his] official capacity." *Id.* at 882. Furthermore, the court relied heavily on the Ninth Circuit's decision in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), which the Seventh Circuit described as "similar to the one before [it]." 408 F.3d at 882. According to the Seventh Circuit, the Ninth Circuit in *In re Marcos* found the FSIA inapplicable *not* because the FSIA did not apply to individuals, but because the alleged acts were not official-capacity acts. *See id.* (describing the Ninth Circuit's decision as holding that defendant was "not entitled to immunity" because "she acted on her own authority and not on the authority of the [Philippines]").

Indeed, in opposing certiorari, the plaintiffs in *Enahoro* advanced that exact reading of the opinion. Although the defendant argued that the Seventh Circuit's decision divided the circuits on the applicability of the FSIA to individuals, the plaintiffs argued that there was no conflict because "a growing number of court decisions," like the Seventh Circuit's, have denied "FSIA immunity" to acts that are "unauthorized in nature, and outside the scope of an official's authority." Brief in Opposition at 12, *Abubakar v.*

Enahoro, 546 U.S. 1175 (2006) (No. 05-788), 2006 WL 189811; *see id.* at 6. This Court denied certiorari notwithstanding the fact that, if the reading of *Enahoro* advanced by petitioners here were correct, the Seventh Circuit created a conflict among multiple courts of appeals, because the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits had all squarely addressed this issue by the time of *Enahoro*.

Because the outcome of *Enahoro* appears to have turned on the rationale that any immunity available under the FSIA extends only to official-capacity acts, the language in the decision regarding applicability of the FSIA to individuals is not binding, and the Seventh Circuit's decision does not conflict with the Second Circuit's decision here. The relevant allegations against Prince Turki pertain to alleged acts taken in his official capacity, and the Second Circuit was clear that individual immunity is so limited. *See* Pet. App. 22a. For those reasons, unless and until the Seventh Circuit clarifies the import of *Enahoro*, there is no conflict among the courts of appeals that warrants this Court's attention.

Moreover, even if petitioners' reading of *Enahoro* were correct, certiorari would be unwarranted. In light of important statutory changes to the FSIA, any remaining disagreement on this issue may well be resolved absent this Court's intervention. Earlier this year, and subsequent to the Seventh Circuit's decision in *Enahoro*, Congress amended the terrorism exception in the FSIA. *See* 28 U.S.C. § 1605A(a)(1). As the Second Circuit explained, Congress's amendment "reinforce[s]" the conclusion that the FSIA applies to individuals: the terrorism exception's reference to "'an official, employee or agent' of a foreign state" "evince[s] congressional recognition that claims

against individual officials of a foreign government must be brought within the confines of the FSIA." Pet. App. 21a.

In the wake of that amendment – which sheds light on the proper interpretation of the FSIA as a whole, *see Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) – as well as substantial uncertainty regarding the scope of *Enahoro*, the Seventh Circuit will be free to reconsider the application of the FSIA to individuals in future cases. *See, e.g., Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 554 F.2d 310, 333 (7th Cir. 1977) ("intervening factor[s]" may justify "one panel" reconsidering "the precedents set by another panel"). Furthermore, because the Seventh Circuit's decision – even read broadly – has been overtaken by subsequent legal developments, it does not represent a conflict with other courts of appeals that should concern this Court. *See* Robert L. Stern et al., *Supreme Court Practice* 230 (8th ed. 2002) ("[a] conflict with a decision that has been discredited" by intervening legal changes "will not be an adequate basis for granting certiorari"). Indeed, because Congress's amendment of the FSIA is of recent vintage and because no court of appeals other than the Second Circuit has considered how that amendment bears on the issue of applicability of the FSIA to individuals, review by this Court now would be premature, foreclosing further ventilation of this issue in the lower courts.

2. Petitioners also argue (at 19) that the Second Circuit's decision "do[es] not recognize any continuing role for common law immunity and thus run[s] squarely against decisions of other circuits recogniz-

ing that common law immunity for heads of state, consular officers, and other government leaders survived the FSIA's passage." Petitioners are wrong.

Head-of-state, consular, and diplomatic immunity are specialized forms of immunity that serve different ends and offer distinct protections from the basic immunity afforded by the common law for official-capacity acts. *See* Restatement (Second) of Foreign Relations Law of the United States § 66 cmt. b (1965). For example, those special forms of immunity attach to both official *and* personal acts (even criminal conduct) but they apply *only* during the time an individual serves as a head of state or diplomat. *See, e.g.*, *Arcaya v. Paez*, 145 F. Supp. 464, 471-72 (S.D.N.Y. 1956) (diplomatic immunity applies to all judicial process but ends when diplomatic status ends), *aff'd*, 244 F.2d 958 (2d Cir. 1957); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (head-of-state immunity encompasses criminal prosecution of sitting heads of state).

That two circuits have recognized that these distinctive immunities remain viable after the enactment of the FSIA does not conflict with the position that the FSIA provides a baseline of immunity for official-capacity acts. Indeed, the Second Circuit did not, as petitioners wrongly contend, refuse to "recognize any continuing role" for common-law immunity; it held only that, because the protections of the FSIA required dismissal of official-capacity claims, it did not "*need [to] consider* any continuing vitality of sovereign immunity under the common law." Pet. App. 18a (emphasis added).[3]

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[3] Petitioners pressed this claim at oral argument before the Second Circuit to no avail. *See* Tr. 26:2-6 (Jan. 18, 2008) ("[I]t's

B. The Position of the United States Does Not Warrant This Court's Review

Petitioners also claim that review is warranted on the basis of a legal position set forth by the United States in other litigation. The United States, petitioners say (at 17), "has consistently urged" that the FSIA "does *not* extend to foreign officials acting in their official capacity." The position of the United States – to which courts owe no "special deference" in interpreting the FSIA, *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) – provides no basis for certiorari here.

First, although the petition itself neglects to mention it, the United States has pressed this issue in other cases because, in its view, sovereign immunity for foreign officials is *absolute* (and thus not subject to the exceptions recognized by the FSIA). "[T]he immunity . . . recognized" for officials under the common law, the United States has said, "did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the restrictive theory, the official himself could not be." Pet. App. 275a; *id.* at 265a (common-law immunity is absolute "and thus broader than the immunity of the state itself" under the FSIA). The upshot of this issue for the United States, then, is that foreign officials should be entirely immune from suit, not that petitioners should be able to proceed with their claims. *See id.* at 249a ("an official should be shielded

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pretty clear that Ambassadors and others who are resident abroad might need some additional or different protection, particularly with respect to what they do in their personal capacities.") (Jacobs, C.J.); *id.* at 26:15-18 ("An immunity that would provide a lesser coverage is not inconsistent with an immunity that would provide a greater coverage, is it?") (Vitaliano, J.).

from personal liability for the performance of official functions"); *id.* at 260a, 274a n.13. Accordingly, because the Second Circuit *dismissed* all claims against Prince Turki, this case does not implicate any concern identified by the United States. *See id.* at 259a ("refusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American officials"). It is petitioners' position – that individuals acting in an official capacity lack immunity – that is most deeply contrary to the interests of the United States.

Indeed, the United States has expressly endorsed the key rationale of the "numerous circuit courts [that] have continued to recognize the existence of immunity for individual foreign officials with respect to their official acts." *Id.* at 270a. Although the United States is of the view that immunity for officials resides in the common law rather than the FSIA, the United States has acknowledged that the Ninth Circuit and other courts have "cogently identified" "the rationale for" immunity, *id.* at 272a – namely, "that 'a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly,'" *id.* at 271a (quoting *Chuidian*, 912 F.2d at 1101); *see id.* (courts have "rightly" recognized that, "unless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA"). As explained below, Prince Turki's alleged conduct was in an official capacity; whether the FSIA or the common law is the source of immunity thus makes no difference to the outcome of this case. *See infra* pp. 25-27.

Second, setting aside that the concerns of the United States are not implicated here, the United States' views do not warrant certiorari. Despite having advanced its position on the applicability of the FSIA to individuals since 1988, no federal court has ever embraced it. *See Chuidian*, 912 F.2d at 1101-03; *Matar v. Dichter*, 500 F. Supp. 2d 284, 289 n.2 (S.D.N.Y. 2007). Indeed, the United States acquiesced in the Ninth Circuit's judgment in *Chuidian* – no party sought this Court's review – and the United States did not file another statement of interest on this question for nearly two decades following *Chuidian*. *See* Pet. App. 272a n.11. During those intervening years, courts regularly applied the FSIA to foreign officials, and there is no evidence of any resulting disruption to U.S. foreign-policy interests.

C. The Decision Below Is Correct

This Court's review is also unwarranted because the decision of the Second Circuit is correct.

As the courts of appeals have now overwhelmingly recognized, the text of the FSIA is naturally read to apply to foreign officials (such as Prince Turki) acting in an official capacity. The FSIA commands that "a foreign state shall be immune from the jurisdiction" of U.S. courts, 28 U.S.C. § 1604; a foreign state is defined to "include[] . . . an agency or instrumentality of a foreign state," *id.* § 1603. As multiple courts have held, consistent with the Second Circuit here, the term "agency or instrumentality" is broad enough to include officials acting in an official capacity. *See* Pet. App. 19a; *Chuidian*, 912 F.2d at 1101; *Belhas v. Ya'alon*, 515 F.3d 1279, 1283 (D.C. Cir. 2008) ("[T]he FSIA is not written so narrowly as to exclude all but foreign states in name. It applies to foreign states, their political subdivisions, and their agencies and

instrumentalities. An individual can qualify as an agency or instrumentality of a foreign state.") (citation, alteration, and internal quotation marks omitted). Petitioners do not dispute that textual analysis.

That understanding of the FSIA is strengthened by the fact that an official-capacity suit is, in all practical effects, a suit against the state itself. It has long been established, in the sovereign-immunity context and elsewhere, that "the acts of the official representatives of the state *are those of the state itself*, when exercised within the scope of their delegated powers." *Underhill*, 65 F. at 579 (emphasis added). It follows that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state" for purposes of the FSIA. *Velasco*, 370 F.3d at 399. There is no evidence in the text or legislative history that Congress intended to depart from these principles in enacting the FSIA.

It is no answer to say that the common law was intended to be the exclusive source of immunity for individuals. That interpretation would render the FSIA largely futile. Were foreign officials unprotected by the FSIA, a plaintiff could merely alter the caption of a complaint against a foreign state and name foreign officials of the state as defendants instead. That would "vitiate[]" the comprehensive regime established by the FSIA by allowing parties to "recast[] the form of their pleadings," *Chuidian*, 912 F.2d at 1102, to avoid implicating the strictures of the FSIA. As this Court has explained, the FSIA is a "comprehensive statute" designed to "remedy" the "problem[]" that immunity decisions had rested with "two different branches" and were subject to a "variety of factors, . . . including diplomatic considerations." *Altmann*, 541 U.S. at 691 (internal quota-

tion marks omitted). The view that individual immunity is subject to the common law and outside the scope of the FSIA would countermand Congress's aim of creating a comprehensive system of immunity based on legal judgments rather than political calculations. *See* Pet. App. 19a.

D. Resolution of This Issue Is Irrelevant to the Outcome of the Case

Finally, for related reasons, this Court's review is unwarranted because, even if the FSIA does not apply to individuals, the claims against Prince Turki must still be dismissed.

As noted above, if Prince Turki is not entitled to immunity under the FSIA, he is entitled to the absolute immunity afforded by the common law. Prior to the enactment of the FSIA, common-law immunity attached to claims against foreign officials for acts taken in their official capacity. *See* Restatement (Second) of Foreign Relations Law of the United States § 66. Under the common law, provided an act was taken in an official capacity, it was treated as the act of the state for immunity purposes. *See, e.g.*, *Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977* (M. Sandler, D. Vagts & B. Ristau, eds.), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1037 (quoting suggestion of immunity: "acts done by Mr. Thomson in the course of, or in connection with, his official duties . . . constitute sovereign or public acts . . . of the Government of Canada, and for such acts the Dominion of Canada is entitled to enjoy sovereign immunity in courts in the United States"); *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971). And, as the United States has said, when that immunity attaches, it is absolute. *See supra* p. 21.

Prince Turki qualifies for immunity under that standard. Petitioners acknowledge that their "lawsuit . . . seeks to impose liability for injuries that [Prince] Turki inflicted while acting within the scope of his employment" as head of DGI. Reply Brief of the *Burnett* Plaintiffs-Appellants at 10 n.4, *In re Terrorist Attacks on September 11, 2001*, Nos. 06-0319-CV(L) et al. (2d Cir. filed Jan. 5, 2007). And Prince Turki has averred – and petitioners have not challenged – that any dealings with Osama bin Laden and/or the Taliban were in his official capacity in carrying out the foreign and national-security policy of Saudi Arabia. *See* Decl. ¶ 5. Because official-capacity claims against Prince Turki must be dismissed whether his immunity lies in the FSIA or the common law, the source of his immunity is academic to the outcome of the case.[4]

Whether the FSIA applies to individuals is irrelevant here for a second reason: even if the FSIA did not apply to individuals, and even assuming that petitioners could somehow evade the absolute bar of common-law immunity, petitioners would still be required to establish the Court's personal jurisdiction

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[4] Prince Turki sought dismissal on grounds of both FSIA and common-law immunity. *See* Prince Turki's Mem. in Support of Mot. To Dismiss Compl. by Federal Insurance Plaintiffs at 2 n.4, *Federal Ins. Co. v. al Qaida*, No. 03CV6978 (S.D.N.Y. filed May 10, 2004); Prince Turki's Mot. To Dismiss at 17-18, *Burnett v. Al Baraka Inv. & Dev. Corp.*, No. 02CV01616 (D.D.C. filed May 5, 2003). And, contrary to petitioners' suggestion (at 19 n.7), the State Department need not make any suggestion of immunity to confer sovereign immunity under the common law; such immunity applies automatically. *See* U.S. Statement of Interest at 8, *Matar v. Dichter*, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-36 (1945); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983).

over Prince Turki. But, as the Second Circuit rightly concluded, petitioners cannot do so consistent with well-established constitutional principles. *See* Part II, *infra*.

II. CERTIORARI IS NOT WARRANTED ON QUESTION THREE

A. The Second Circuit Correctly Applied Settled Principles of Personal Jurisdiction and Created No Conflict in Doing So

1. As to petitioners' personal-capacity allegations, the Second Circuit – applying this Court's decisions in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Calder v. Jones*, 465 U.S. 783 (1984), and *Burger King*, *supra* – held that allegations that the Four Princes donated money to charities that in turn diverted funds to al Qaeda do not constitute conduct "'expressly aimed'" at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction. Pet. App. 43a (quoting *Calder*, 465 U.S. at 789). Petitioners have not alleged, the court found, "that the Four Princes directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them." *Id.* at 42a. And the allegations that petitioners have made that foreign persons donated money to foreign charities – are insufficient to "establish that the Four Princes 'expressly aimed' intentional tortious acts at residents of the United States." *Id.* at 44a (quoting *Calder*, 465 U.S. at 789).

That holding is correct. Even if it were true (and it is not) that Prince Turki, at some unspecified point in time, made personal donations to foreign charities that in turn made payments to al Qaeda, it would not follow that Prince Turki expressly aimed any conduct toward the United States. Just as "[t]he placement

of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State," *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 112 (1987) (plurality op.), so, too, an alleged contribution (in an unspecified way, at an unspecified time) to a foreign charity that allegedly used the contributions to fund global terrorism is not purposefully directed toward the United States, *see Burger King*, 471 U.S. at 474 ("foreseeability" of injury in forum "is not a sufficient benchmark for exercising personal jurisdiction") (internal quotation marks omitted); *World-Wide Volkswagen*, 444 U.S. at 295.

2. Petitioners maintain that the Second Circuit's holding conflicts with this Court's precedent. They acknowledge that mere "foresee[ability]" of injury in a forum is not sufficient for a court to exercise personal jurisdiction, but, they argue, petitioners allege that the Four Princes "*knowingly* funneled money to al Qaeda *knowing* al Qaeda intended to use those funds to attack U.S. civilians in the United States." Pet. 27. That mischaracterizes the allegations: with respect to Prince Turki, for example, petitioners allege only that Prince Turki made "personal contributions to Saudi-based charities that he knew to be sponsors of al Qaida's global operations" and that he "knew and intended that the contributions . . . would be used to fund al Qaida's global operations." Compl. ¶¶ 451, 452. Even taking such frivolous, conclusory allegations as true, they are insufficient to support personal jurisdiction because they do not aver that Prince Turki expressly aimed conduct *at the United States*, let alone that he intended his donations to be used "to attack U.S. civilians." *See Calder*, 465 U.S. at 790 (personal jurisdiction is proper where defen-

dants are "primary participants in an alleged wrongdoing intentionally directed" at forum).

3. Petitioners incorrectly assert (at 28) that this holding "conflicts with decisions of the Seventh, Ninth, and D.C. Circuits." In *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997), the Seventh Circuit held that allegations that a California company intentionally "threaten[ed]" an Illinois company's "customers" – which caused the Illinois company to lose customers – was conduct aimed at Illinois sufficient to support personal jurisdiction there. *Id.* at 1202-03. That poses no conflict with the decision below because petitioners here do not allege that Prince Turki aimed any conduct at the United States or U.S. residents.

Similarly, in *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998), the Ninth Circuit held that purposeful availment can be satisfied when a "defendant has taken deliberate action toward the forum state." *Id.* at 1320 (internal quotation marks omitted). That standard was satisfied because the defendant "engaged in a scheme" to "extort[] money from" the plaintiff and, in that way, the defendant "directed his activity" toward the forum of the plaintiff's "principal place of business." *Id.* at 1322. Here, by contrast, petitioners do not allege that Prince Turki took any "deliberate action" toward the United States.[5]

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[5] Petitioners point (at 29-30) to district court decisions that, they say, conflict with the decision below. Even assuming such a conflict would warrant this Court's attention, those decisions, as the Second Circuit found, are consistent with the decision below because each defendant was a terrorist or a primary participant in a terrorist attack. *See* Pet. App. 41a-42a. That distinction matters for purposes of personal jurisdiction because

Finally, petitioners assert a conflict with *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2005). As the Second Circuit explained, *Mwani* is consistent with the decision below. *See* Pet. App. 41a. In *Mwani*, the D.C. Circuit found personal jurisdiction over Osama bin Laden and al Qaeda with respect to injuries arising out of bombings of U.S. embassies abroad. Based on those facts, the D.C. Circuit held that "there is no doubt that the defendants engaged in unabashedly malignant actions *directed at* and felt in this forum." 417 F.3d at 13 (alterations and internal quotation marks omitted; emphasis added). Bin Laden's and al Qaeda's "decision to purposefully direct their terror at the United States" supported personal jurisdiction. *Id.* at 14. Here, petitioners do not allege that Prince Turki directed any conduct toward the United States.[6]

B. This Case Is an Unsuitable Vehicle To Resolve the Personal-Jurisdiction Question

Certiorari is also unwarranted because this case is a poor vehicle to resolve the issue.

First, resolution of this issue is irrelevant to the disposition of the claims against Prince Turki. Allegations that Prince Turki knowingly and intentionally donated money to charities that in turn funded al Qaeda are insufficient to satisfy *any* standard of personal jurisdiction.

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a terrorist participating in or directly aiding a terrorist attack against the United States or U.S. residents can be said to have expressly aimed conduct at the forum.

[6] The Seventh Circuit's recent decision in *Boim v. Holy Land Foundation for Relief & Development*, Nos. 05-1815 et al., 2008 WL 5071758 (7th Cir. Dec. 3, 2008) (en banc), involved defendants residing in the United States and therefore did not address issues of personal jurisdiction.

As explained previously, the only personal-capacity allegations against Prince Turki are two conclusory sentences by the *Federal Insurance* plaintiffs. Those allegations were added after the first dismissal of official-capacity claims, are contradicted by Prince Turki's sworn declaration, and remain unsubstantiated even in the face of Prince Turki's Rule 11 demand letter. *See supra* pp. 8-9.

Such conclusory allegations – even taking them to be true – are insufficient to support the exercise of personal jurisdiction. As the district court held, petitioners have failed to present any "specific facts from which [the court] could infer Prince Turki's primary and personal involvement in, or support of, international terrorism and al Qaeda." Pet. App. 188a. "Conclusory allegations that [Prince Turki] donated money to charities" and that he knew those charities were funneling money to al Qaeda "do not suffice." *Id.* A refusal to credit conclusory allegations of knowing and intentional support of al Qaeda is in accord with settled precedent, *see Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998), and makes clear that petitioners' personal-capacity allegations are legally insufficient under *any* standard of personal jurisdiction. This case is accordingly an inapt vehicle to address the proper legal standard for personal jurisdiction in terrorism-related litigation.

Second, this case is an unsuitable vehicle because petitioners themselves cannot decide on the scope of the Second Circuit's decision. In their petition, petitioners assert (at 26) that the Second Circuit held that "U.S. courts cannot adjudicate claims against persons who provide material support abroad to

terrorists known to target the United States." In a filing submitted to the district less than two weeks after the petition, however, petitioners aggressively argue *against* such a "sweeping interpretation" of the Second Circuit's decision. *See* Pls.' Reply to Defs.' Supp. Br. on Second Circuit Decision at 7, *In re Terrorist Attacks on September 11, 2001*, No. 03MDL1570 (GBD) (S.D.N.Y. filed Nov. 25, 2008). Petitioners urge instead that the Second Circuit's decision be read to apply only where jurisdiction is sought on the basis of alleged "indirect[]" support for al Qaeda, while permitting petitioners to proceed against alleged "direct sponsors" of al Qaeda. *Id.* at 8-9. Indeed, petitioners' district court brief candidly acknowledges the tension between their two different readings of the Second Circuit's decision and asserts that their broader characterization in this Court is justified by their desire to secure this Court's review. *See id.* at 9 n.8. In light of petitioners' own inability to come to rest on a consistent understanding of the scope of the Second Circuit's decision, this case is a poor vehicle to revisit settled principles of personal jurisdiction.

C. The Decision Below Will Not Undermine Application of Anti-Terrorism Statutes

Petitioners claim (at 32) that the Second Circuit's decision creates "a constitutional barrier to jurisdiction in U.S. courts over those who facilitate but do not directly commit or command acts of terrorism." As explained, however, the Second Circuit merely applied long-settled precedent establishing that foreseeability of injury in a forum is insufficient to establish personal jurisdiction. *See* Pet. App. 44a. For non-primary participants in tortious conduct, the Second Circuit said, a plaintiff "must establish" that

the defendant "'expressly aimed' intentional tortious acts at residents of the United States." *Id.* (quoting *Calder*, 465 U.S. at 789).

The decision below does not "sharply limit[] the scope and enforceability" of criminal and civil anti-terrorism provisions, as petitioners contend (at 32). For one thing, the Second Circuit did not address any claims involving "'primary participants.'" Pet. App. 42a (quoting *Calder*, 465 U.S. at 790) (emphasis omitted). And, with respect to non-primary participants, the decision stands only for the limited proposition that a plaintiff must establish that a defendant aimed intentional tortious acts at the United States or U.S. residents. Petitioners suggest no reason why that standard, which tracks this Court's precedent, will undermine the effectiveness of anti-terrorism statutes.

If application of basic principles of personal jurisdiction ever did come to interfere with anti-terrorism statutes, this Court's review in future cases might be appropriate. But petitioners' scattershot, conclusory allegations against Prince Turki and other respondents are far afield from a proper enforcement of those statutes. In view of the obvious defects with petitioners' unsubstantiated and conclusory allegations – and the resulting certainty that dismissal of these respondents is the only proper outcome here – this Court's review is inappropriate in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE
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FEDERAL INSURANCE COMPANY, *et al.*,
Petitioners,
v.
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Respondents.

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QUESTIONS PRESENTED

1. Whether a high-ranking foreign official sued in U.S. courts for acts undertaken in an official capacity in furtherance of a foreign sovereign's national and foreign policy objectives is entitled to sovereign immunity.

2. Whether a plaintiff can use the "noncommercial torts" exception to sovereign immunity in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(5), to sue a high-ranking official of an ally of the United States on allegations that the official, acting in his official capacity, provided material support and resources for a terrorist act, when the U.S. government has not designated the ally as a state sponsor of terrorism and the plaintiff therefore cannot proceed under the FSIA's terrorism exception, *id.* §1605A.

3. Whether allegations that a foreign person donated money to a foreign charity allegedly knowing that the money would be diverted to al Qaeda represents conduct expressly aimed at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction over the person.

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INTRODUCTION

Petitioners brought these damages actions against hundreds of banks, charities, government institutions, and other defendants on the theory that they all "provided financial, logistical, and other support to al Qaeda" and should therefore all be liable for the attacks of Sep-

tember 11, 2001. Pet. App. 118a. The defendants included respondents here—members of the Saudi royal family (the "Princes") who were, at all relevant times, high-ranking public officials in the Saudi government. Petitioners' claims against the Princes have now been rejected by two district courts and a unanimous panel of the Second Circuit. That every judge has come to the same conclusion should come as no surprise. The claims are without merit and would not have been permitted in any circuit.

Seeking to overcome the legal defects in their cases, petitioners play fast and loose with the facts. They assert a "close relationship" between al Qaeda and Saudi officials, citing the 9/11 Commission's report. Pet. 4-5. But they overlook the Commission's express conclusion to the contrary—even though it appears as the second half of a sentence petitioners quote. Pet. 4. There is "*no evidence*," the Commission concluded, "that the Saudi government as an institution or senior Saudi officials individually funded [al Qaeda]." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (2004) ("9/11 Report") (emphasis added).

Petitioners likewise take liberties when they characterize this suit as an action against those who "deliberately channeled resources to al Qaeda * * * knowing that al Qaeda intended to use those resources to attack the United States and its citizens." Pet. 4; see *id.* at 31. The complaints allege only that the Princes made donations to established Islamic charities that, in turn, supposedly diverted funds to al Qaeda. See, *e.g.*, C.A. App. 2007-2013. More fundamentally, petitioners ignore the district court's express findings. Acting as trier of fact for purposes of determining jurisdiction, the court "reviewed the complaints in their entirety and f[ou]nd no allegations from which it c[ould] infer that the Princes knew the

charities to which they donated were fronts for al Qaeda." Pet. App. 161a. Petitioners' allegations against the Princes lack merit and were properly dismissed.

STATEMENT

I. Background

A. The Princes

Respondents HRH Crown Prince Sultan bin Abdulaziz al-Saud ("Crown Prince Sultan"), HRH Prince Naif bin Abdulaziz al-Saud ("Prince Naif"), and HRH Prince Salman bin Abdulaziz al-Saud ("Prince Salman") are all members of the royal family of Saudi Arabia. They are also high-ranking officials in the Saudi government.

Crown Prince Sultan is Saudi Arabia's second highest-ranking official and the designated successor to the King. Pet. App. 6a. He is currently the First Deputy President of the Council of Ministers, Saudi Arabia's highest governing body. C.A. App. 1332. For the past 44 years, Crown Prince Sultan has been Saudi Arabia's Minister of Defense and Aviation. *Ibid.* He is also Chairman of the Supreme Council for Islamic Affairs, a governmental body created by King Fahd to ensure that Saudi Arabia's support of international charities is consistent with its foreign and religious policies. *Id.* at 1332-1333. The Supreme Council, however, does not police the activities of those charities; oversight is exercised through officials who head particular organizations. *Id.* at 1333.

Prince Naif has served as Saudi Arabia's Minister of Interior since 1975. Pet. App. 60a. He oversees matters relating to public security, civil defense, fire service, police, and investigative forces. *Id.* at 7a, 74a. He is also a member of the Council of Ministers. See *id.* at 60a-61a, 69a.

Prince Salman has been the Governor of Riyadh province since 1962 and is the head of respondent Saudi High Commission ("SHC"). Pet. App. 57a, 59a, 69a. SHC is an

organ of Saudi Arabia's government formed to fund relief efforts in Bosnia-Herzegovina in response to the ethnic cleansing campaign of Slobodan Milosevic. See *id.* at 3a-4a.

B. Bin Laden's Declared War Against The Saudi Government And The Princes

The relationship between the Saudi government and Osama bin Laden has been one of enmity since long before the terrorist attacks of September 11, 2001. In 1994, Saudi Arabia, acting through Prince Naif, stripped bin Laden of his Saudi citizenship and ordered his assets frozen so that they could not be used for terrorist purposes. C.A. App. 2193. Bin Laden responded by targeting the Saudi government. He "condemned the Saudi monarchy for allowing the presence of [American troops] in a land with the sites most sacred to Islam" and called for attacks in Saudi Arabia. 9/11 Report, *supra*, at 48.

Bin Laden reserved much of his venom for the Princes individually. In a 1995 Open Letter to King Fahd, he singled them out by name, labeling them the "source of the disease" in Saudi Arabia. C.A. App. 2197. In his 1996 "Declaration of War," he branded Crown Prince Sultan and Prince Naif as "traitors who implement the policy of the enemy." *Id.* at 2314.

The Saudi government attempted to bring bin Laden to justice. In a 1997 CNN interview, bin Laden acknowledged Saudi Arabia's efforts to disrupt his activities, including "several attempts to arrest or to assassinate me." C.A. App. 2341-2342. The 9/11 Commission documented Saudi diplomatic efforts to pressure the Taliban to expel bin Laden from Afghanistan. 9/11 Report, *supra*, at 115.

After thoroughly examining the Saudi government's relationship with bin Laden and al Qaeda before September 11, the 9/11 Commission concluded that the ruling monarchy knew bin Laden was an enemy and aided in

disrupting his terrorist cells. 9/11 Report, *supra*, at 115. The Commission further concluded that there is "no evidence that the Saudi government as an institution or senior Saudi officials individually funded [al Qaeda]." *Id.* at 171.

II. Proceedings Below

A. The Complaints

Petitioners seek to hold hundreds of banks, charities, governments, and individuals liable for the terrorist attacks of September 11, 2001, because, according to petitioners, they provided "financial, logistical, and other support to al Qaeda." Pet. App. 118a. Notwithstanding the open hostility between the Princes and bin Laden, petitioners claim that the Princes channeled donations to Islamic charities knowing that those funds would be transferred to finance al Qaeda.

The first of the complaints, *Burnett* v. *Al Baraka Investment & Development Corp.*, No. Civ-A-02-1616(JR), was filed in August 2002 in the District Court for the District of Columbia. That suit alleged, in essence, that the Princes and others had caused the 9/11 attacks by contributing to charities or overseeing agencies that financially supported terrorists. For example, plaintiffs alleged that Crown Prince Sultan, as Chairman of the Supreme Council, "could not have overlooked the role of the Saudi charitable entities identified herein in financing the al Qaeda terrorist organization." C.A. App. 1236-1237.

Other complaints were then filed in the District Court for the Southern District of New York. See, *e.g.*, C.A. App. 1447-1731, 1738-1756, 1788-2136. The complaints all contain substantially the same conclusory allegations—that the Princes "knew and intended" that their donations would be used to support al Qaeda, and that Crown Prince Sultan (as head of the Supreme Council) and

Prince Salman (as head of SHC) did not properly oversee the use of charitable funds. See, *e.g.*, *id.* at 2007-2013.[1]

B. The District Court Decisions

1. On November 14, 2003, Judge Robertson of the District Court for the District of Columbia dismissed the *Burnett* complaint against Crown Prince Sultan as well as Prince Turki al-Faisal bin Abdulaziz al-Saud ("Prince Turki"). The court explained that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602 *et seq.*, provides "'the sole basis for obtaining jurisdiction over a foreign state in Federal courts.'" *Burnett* v. *Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 14 (D.D.C. 2003) (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). Under the FSIA, foreign states are presumptively immune from suit unless a specified exception applies. 28 U.S.C. §§1604, 1605. Following circuit precedent, the court construed the Act to encompass suits against individual officers in their official capacity. 292 F. Supp. 2d at 14.

The court rejected the claim that the conduct alleged in the complaint fell within the FSIA's exception for noncommercial torts, 28 U.S.C. §1605(a)(5), for two reasons. First, it held that the connection between the charitable

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[1] Petitioners err in suggesting (at 5) that the charities the Princes allegedly supported were designated terrorist groups when the donations were made. The complaints allege that, *before the attacks*, the Princes donated to the International Islamic Relief Organization ("IIRO"), World Assembly of Muslim Youth, Muslim World League, Sanabel al-Kheer, and al Haramain. See, *e.g.*, C.A. App. 2007-2013. But none of the entities allegedly supported was then designated. See U.S. Dep't of Treasury, *Protecting Charitable Organizations*, http://www.ustreas.gov/offices/enforcement/key-issues/protecting/fto.shtml. A handful of branch offices of al Haramain and IIRO were designated after the attacks, but the complaints do not allege contributions to those offices. See *ibid.* Al Haramain's worldwide organization was not designated until June 2008. *Ibid.*

giving and the 9/11 attacks was so attenuated that it "would stretch the causation requirement of the non-commercial torts exception not only to 'the farthest reaches of the common law,' but perhaps beyond, to *terra incognita*." 292 F. Supp. 2d at 20. Second, the court held that the conduct fell within the "discretionary function" exclusion from the non-commercial torts exception. *Id.* at 20-21 (citing 28 U.S.C. §1605(a)(5)(A)). Under that exclusion, "decisions grounded in social, economic, and political policy" are protected by sovereign immunity even if they would otherwise be considered non-commercial torts. *Id.* at 21. The court found it "nearly self-evident" that deciding "what disbursements should be made to Islamic charitable organizations" consistent with Saudi Arabia's foreign and religious policies falls within that exclusion. *Id.* at 20-21. The court also observed that, while the complaint alleged provision of material support to terrorism, the FSIA exception addressing that type of conduct "does not apply here." *Id.* at 20 n.5 (citing former 28 U.S.C. §1605(a)(7)).[2]

Finally, the district court found that it lacked personal jurisdiction over Crown Prince Sultan, who had also been sued in his individual capacity. Petitioners, the court ruled, had failed to show that Crown Prince Sultan had purposefully directed any conduct at the United States. 292 F. Supp. 2d at 22-23. Consequently, he could not "reasonably anticipate that he might be subject to suit here." *Id.* at 21-23.

2. In December 2003, the Judicial Panel on Multidistrict Litigation transferred *Burnett* to the Southern District of New York for consolidated pretrial proceedings

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[2] At the time the district court ruled, the terrorism exception appeared at 28 U.S.C. §1605(a)(7). That provision was amended in 2008. National Defense Authorization Act, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338 (2008), and now appears at 28 U.S.C. §1605A.

with the actions that had been filed there. C.A. App. 1785-1786. Judge Casey then dismissed the claims against Crown Prince Sultan and Prince Turki for many of the reasons identified by Judge Robertson. Pet. App. 117a-238a. Like Judge Robertson, Judge Casey concluded that FSIA immunity is available to officials acting in their individual official capacities. *Id.* at 137a. Also like Judge Robertson, Judge Casey rejected petitioners' reliance on the non-commercial torts exception. Acting as a factfinder for purposes of determining jurisdiction under the FSIA, the court concluded that petitioners had failed to plead "facts to suggest that the Princes knew they were making contributions to terrorist fronts and provided substantial assistance or encouragement to the terrorists." *Id.* at 161a. The court "reviewed the complaints in their entirety and f[ound] no allegations from which it c[ould] infer that the Princes knew the charities to which they donated were fronts for al Qaeda." *Ibid.* Again like Judge Robertson, Judge Casey concluded that, even if the non-commercial torts exception applied, the conduct fell within the discretionary-function exclusion from that exception. The alleged conduct—coordinating government grants to charities—"involved an element of choice or judgment based on considerations of public policy." *Id.* at 163a.

Finally, like Judge Robertson, Judge Casey found personal jurisdiction lacking. Pet. App. 187a-189a. Petitioners had offered only "conclusory allegations" that fell short of showing that the Princes "purposefully directed [their] activities at this forum by donating to charities that [they] knew at the time supported international terrorism." *Id.* at 187a.

The court later dismissed the claims against Princes Naif and Salman on the same grounds. Pet. App. 54a-116a.

C. Proceedings In The Court Of Appeals

The Second Circuit unanimously affirmed. Pet. App. 1a-47a.

1. The court of appeals first addressed whether an individual official could claim immunity under the FSIA. The Act, by its terms, applies to any "foreign state," including any "agency or instrumentality" of the state. 28 U.S.C. §§1603(a), 1604. Based on the FSIA's text and history, the court concluded that "an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state and is thereby protected by the FSIA." Pet. App. 14a, 19a. The FSIA, the court explained, was intended to "codify the existing common law principles of sovereign immunity," which "expressly extended immunity to individual officials acting in their official capacity." *Id.* at 18a. And nowhere did Congress "'even hint [at] an intent to exclude individual officials.'" *Ibid.* (quoting *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990)).

The court rejected the argument that only an artificial entity can be an "agency or instrumentality of a foreign state." It observed that "an agency is any thing or person through which action is accomplished." Pet. App. 19a-20a. The term is thus "easily open enough to include senior members of a foreign state's government and secretariat" such as the Princes. *Id.* at 20a.

The court also relied on a recent amendment to the FSIA's terrorism exception, which specifically refers to "official[s], employee[s] or agent[s]" of a foreign state. 28 U.S.C. §1605A(a)(1), (c). The court reasoned that, if individual officers were not covered by the FSIA in the first place, there would be no need to include such language in the exception. Pet. App. 21a-22a.

The court noted that, in other cases, the United States had argued that the immunity of individual officials was

governed by "expansive" common-law principles. Pet. App. 17a-19a. But the court found it unnecessary to address the scope of any common-law immunity: "Because we decide this case on the ground that the FSIA protects individual government representatives in their official capacities, we need not consider any continuing vitality of sovereign immunity under the common law." *Id.* at 18a.

2. The court of appeals also rejected petitioners' argument that the conduct at issue here falls within the FSIA's non-commercial torts exception. Congress, the court explained, specifically addressed the scope of immunity for providing support to terrorists under the terrorism exception, 28 U.S.C. §1605A. Under that more specific provision, foreign states lack immunity for providing "material support" for terrorism, but *only* if the state has been "designated as a state sponsor of terrorism" by the United States before (or as a result of) the act at issue. *Id.* §1605A(a)(1)-(2).

Petitioners acknowledged that their claims concerned the type of conduct governed by that exception—provision of "material support or resources" to terrorists. See, *e.g.*, Fed. Ins. C.A. Br. 6. And they did not dispute that they failed to meet the requirements of the terrorism exception because Saudi Arabia has *not* been designated a state sponsor of terrorism. Pet. App. 31a. Petitioners nonetheless sought to proceed under the more general FSIA exception for non-commercial torts. See *id.* at 26a. The court of appeals found it unnecessary to address whether (as both district courts had determined) the conduct at issue fell within the discretionary function exclusion. See pp. 7-8, *supra*. Instead, the court of appeals interpreted Section 1605A as providing the sole means of avoiding immunity in cases involving material support to terrorism. If parties could proceed under the general non-commercial torts exception despite failing to meet the requirements of Section 1605A, the court of appeals

observed, "[a]n important procedural safeguard—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a.

3. Finally, the court of appeals upheld the district court's conclusion that it lacked personal jurisdiction over the Princes. Petitioners, it ruled, had not shown that the Princes "engaged in 'intentional, and allegedly tortious, actions * * * expressly aimed' at residents of the United States." Pet. App. 43a (quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984)). Petitioners "rel[ied] on a causal chain to argue a concerted action theory of liability: the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda, which then used the money to finance the September 11 attacks." *Id.* at 42a-43a. That attenuated causal chain, the court held, did not establish personal jurisdiction. While "[i]t may be the case that acts of violence against the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda, * * * foreseeability is not the standard for recognizing personal jurisdiction." *Id.* at 44a. "Rather, the plaintiffs must establish that the [Princes] 'expressly aimed' intentional tortious acts at residents of the United States." *Ibid.* (quoting *Calder*, 465 U.S. at 789). The court held that "indirect funding to an organization that was openly hostile to the United States" does not satisfy that standard. *Ibid.*[3]

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[3] The court also concluded that the FSIA's "commercial activities" exception did not apply, and that SHC was an "agency or instrumentality" of Saudi Arabia. Pet. App. 22a-26a, 35a-39a. Those rulings are not at issue here.

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Holding That The FSIA Applies To Individual Officers Acting In Their Official Capacity Does Not Warrant Review

The Second Circuit's conclusion that the FSIA applies to individuals acting in their official capacity is consistent with overwhelming circuit authority. Six circuits agree that the FSIA applies to such suits. Petitioners nevertheless seek review based on a purported conflict with a single Seventh Circuit decision and views expressed by the United States. But the precise meaning and continuing vitality of the Seventh Circuit's decision are far from clear. Any disagreement, moreover, relates only to *which source of law* provides immunity—the FSIA, the common law, or both—not to *whether* individual officials are immune. Whatever academic significance that may have, it has no *practical* significance unless the approaches lead to different results. And on that issue, petitioners utterly fail to meet their burden, both generally and on the facts of this case.

A. The Decision Below Follows Overwhelming Circuit Authority

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. §1604, and defines "foreign state" to "include[] * * * an agency or instrumentality of a foreign state," *id.* §1603(a). The Second Circuit concluded that the term "foreign state" encompasses individual officers acting in their official capacity. Pet. App. 19a. Petitioners concede, as they must, that the Second Circuit's holding accords with decisions of the Fourth, Fifth, Sixth, Ninth, and D.C. Circuits. Pet. 14.

The Fourth Circuit, for example, has squarely held that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign

state," and that officials are thus immune for their official acts under the FSIA. *Velasco* v. *Gov't of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004). Likewise, the Sixth Circuit has stated that "normally foreign sovereign immunity extends to individuals acting in their official capacities." *Keller* v. *Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002). The Fifth, Ninth, and D.C. Circuits agree. See *Byrd* v. *Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997); *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990).

That interpretation makes sense. As the Second Circuit explained, suits against individuals in their official capacity are, in legal contemplation, suits against the state. See Pet. App. 20a-21a. "'It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.'" *Chuidian*, 912 F.2d at 1101-1102 (citing *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Because an individual's official acts are, by definition, acts of the "state," it is perfectly natural to read the FSIA's grant of immunity to "foreign state[s]" as encompassing those official acts. The FSIA, moreover, was designed to codify the common-law sovereign immunity principles that pre-dated its enactment. Pet. App. 18a. Those common-law principles "'expressly extended immunity to individual officials acting in their official capacity.'" *Ibid.* (quoting *Chuidian*, 912 F.2d at 1101).

Finally, as the Second Circuit observed, the FSIA specifically covers "agenc[ies]" of a state, 28 U.S.C. §1603(a), and that term is readily construed to encompass "any thing or person through which action is accomplished," Pet. App. 19a-20a. Moreover, even if an officer were not an "agency," the Act provides that the term "'foreign state' * * * *includes* * * * an agency or instrumentality

of a foreign state." 28 U.S.C. §1603(a) (emphasis added). "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). The statute thus comfortably encompasses suits against individual officers for actions undertaken in their official capacities, consistent with the common law. The consensus among the circuits on that issue disproves any need for this Court's review.[4]

B. There Is No Circuit Conflict Justifying Review

Petitioners' claim of circuit conflict is based almost entirely on a single case—*Enahoro* v. *Abubakar*, 408 F.3d 877 (7th Cir. 2005). Pet. 16. But the purported disagreement with that solitary and ambiguous decision is both unfounded and academic.

1. As an initial matter, *Enahoro*'s holding is far from clear. The plaintiffs in that case sued General Abubakar, a member of a military junta that ruled Nigeria in the 1990s, for torture and wrongful death. 408 F.3d at 879-880. Abubakar claimed immunity under the FSIA. *Id.* at 880. The Seventh Circuit questioned that claim. "If Congress meant to include individuals acting in the official capacity in the scope of the FSIA," the court stated, "it would have done so in clear and unmistakable terms."

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[4] Petitioners rely (at 18) on a statement in the legislative history that "the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives." H.R. Rep. No. 94-1487, at 21 (1976). Diplomatic and consular immunity, however, are distinct from a state's own sovereign immunity. See Restatement (Second) of Foreign Relations Law §§66 cmt. b, 73, 81 (1965). Diplomatic immunity, for example, applies even to a diplomat's *unofficial* acts. See *id.* §81 & cmt. c. That the Foreign *Sovereign Immunities* Act does not address those specialized forms of immunity does not preclude it from addressing the *sovereign* immunity individual officials have for their *official* acts on behalf of the state.

Id. at 881-882. The court, however, went on to observe at length that other cases had applied the FSIA to individual officers, *so long as* the officer was "acting in his official capacity." *Id.* at 882. It noted that *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), "[a] case which is similar to the one before us," rejected an immunity claim because the defendant was "act[ing] on her own authority and not on the authority of the [state]." 408 F.3d at 882. The court then "conclude[d], based on the language of the statute, that the FSIA does not apply to General Abubakar." *Ibid.* The court did not explain whether the dispositive fact was that Abubakar was an individual; that he had acted outside the scope of his official authority; or both.

The briefing in *Enahoro* casts serious doubt on whether that decision rests on the first ground. The plaintiffs did not argue that the FSIA is categorically inapplicable to individual officers. Instead, they contended that "individuals who act[] beyond the scope of their official capacity have no immunity under the FSIA." Enahoro Br. 21, *Enahoro* v. *Abubakar*, No. 03-3089 (7th Cir. Apr. 27, 2004). Indeed, the plaintiffs seemed to concede that the FSIA *could* apply to individuals, stating that, "[u]nder *Chuidian*, foreign officials are entitled to sovereign immunity only when acting in their official capacities." *Id.* at 23. And the defendant pointed out the plaintiffs' "fail[ure] to address the multiple cases * * * which hold that individuals acting in an official capacity on behalf of a foreign sovereign are immune under the FSIA." Abubakar Reply Br. 10, *Enahoro* v. *Abubakar*, No. 03-3089 (7th Cir. June 25, 2004).

The basis for the Seventh Circuit's ruling is thus ambiguous. So too is the decision's continuing vitality. In 2008—years after *Enahoro* was decided—Congress revised the Act's terrorism exception, adding specific references to "official[s], employee[s] or agent[s]" of a for-

eign state. 28 U.S.C. §1605A(a)(1), (c); see p. 7 n.2, *supra*. The Second Circuit relied on those amendments below. If individual officers were not covered by the FSIA, the court explained, there would have been no need to refer to them in the exception. See Pet. App. 21a-22a. That was appropriate: Although "the view of a later Congress does not establish definitively the meaning of an earlier enactment, * * * it does have persuasive value." *Bell* v. *New Jersey*, 461 U.S. 773, 784-785 (1983); see also *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). A future panel of the Seventh Circuit thus could conclude that *Enahoro* did not definitely resolve the question at issue here; that its discussion was mere *dictum*; or that the 2008 amendments require a different result. As things now stand, there is no clear conflict warranting this Court's review.

2. Even if *Enahoro* had squarely rejected FSIA immunity for official-capacity suits, its disagreement with the court below would be academic. Before the FSIA's enactment, it was well established that the common law "extended immunity to individual officials acting in their official capacity." *Chuidian*, 912 F.2d at 1101; see Restatement (Second) of Foreign Relations Law §66(f) (1965). Most courts, like the court below, have interpreted the FSIA to codify that common-law immunity. See pp. 12-13, *supra*. But there is no dispute that, if the FSIA did *not* address that issue, the common law would continue to apply. Nothing in the FSIA suggests that Congress *eliminated* sovereign immunity for the official acts of individual officers.

Enahoro is silent on the issue of common-law immunity. The defendant there claimed immunity only under "the FSIA," 408 F.3d at 880, and the court held only that "the FSIA" did not provide immunity, *id.* at 882. As the United States has noted, "[t]he court was not presented with, and thus had no occasion to consider, * * * immu-

nity * * * rooted in common law." Pet. App. 270a-271a n.9. Moreover, there is every reason to believe that the Seventh Circuit would recognize such immunity. In *Ye* v. *Zemin*, 383 F.3d 620 (7th Cir. 2004), the court held that "the FSIA does not apply to heads of states," but accorded common-law head-of-state immunity nonetheless. *Id.* at 625. There is no reason to expect the court to take a different approach to immunity for individual officers sued in their official capacity.

Thus, even if one were to read *Enahoro* as disagreeing about whether *the FSIA* provides immunity, that disagreement would at most amount to a dispute over the *source* of individual-officer immunity—the FSIA, the common law, or both. See Pet. App. 18a (finding immunity under the FSIA while reserving judgment on the availability of "sovereign immunity under the common law"). There still would be no dispute over *whether* immunity is available for official acts—the only issue with practical significance.

3. Petitioners also half-heartedly claim that the decision below is in "considerable tension" with decisions of the Tenth and Eleventh Circuits in a "related context." Pet. 14, 16-17. But those cases address only whether the FSIA applies to *criminal* acts. See *Southway* v. *Cent. Bank of Nigeria*, 198 F.3d 1210, 1214 n.4 (10th Cir. 1999); *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). That context is "related" only in the sense that it involves the same statute. Petitioners also claim another "source of tension" in decisions granting head-of-state immunity. Pet. 19-20. But the Second Circuit did not reject *any* form of common-law immunity, Pet. App. 18a, much less head-of-state immunity, cf. p. 14 n.4, *supra*. That petitioners claim conflicts with such obviously inapposite decisions underscores the absence of any genuine need for review.

C. The United States' Position Does Not Justify Review

Petitioners also rely on a purported conflict with the views of the United States. They again fail to show a disagreement of any practical significance.

1. Petitioners claim that, in the United States' view, "it is of 'critical importance' that FSIA §1603 not be construed to include foreign officials [because] such a construction would potentially 'bring U.S. sovereign immunity law into conflict with customary international law.'" Pet. 18 (quoting Pet. App. 278a, 282a). Petitioners misstate the United States' position.

The question of "critical importance" that the United States referenced was whether "the FSIA *eliminated* immunity for individual foreign officials" altogether. Pet. App. 278a-283a (emphasis added). That question is not implicated here. *No* party to this case suggests that foreign officials are entitled to no immunity at all. The Second Circuit held that the FSIA provides immunity, and left open the possibility that the common law provides immunity as well. See *id.* at 18a. Petitioners argue that the FSIA does not apply, but do not dispute that common-law immunity is available in some cases. Cf. Pet. 19 n.7. And no circuit court has ever held that the FSIA eliminated immunity for individual officers entirely. Petitioners' central claim of "critical importance" is thus a self-created spectre.

The United States has persuasively explained why the FSIA did not eliminate individual-officer immunity. "Given that Congress expressly sought to preserve pre-existing immunity rules for foreign states, it would be incongruous to believe that Congress simultaneously abrogated the long standing immunity of individual foreign officials." Pet. App. 269a. The United States has invoked the same decisions the Second Circuit relied on here, not-

ing that "numerous circuit courts have continued to recognize the existence of immunity for individual foreign officials with respect to their official acts." *Id.* at 270a (citing *Velasco*, *Keller*, *Byrd*, and *Chuidian*). And it has opined that "the rationale for the immunity recognized in these cases has * * * been cogently identified." *Id.* at 272a. "[U]nless sovereign immunity extends to individual foreign officials, litigants could easily circumvent the immunity provided to foreign states by the FSIA." *Id.* at 271a. By granting individual officers immunity, the decision below fully respects those principles.

2. To the extent there is any tension between the decision below and the United States' position, it is over *what source of law* provides immunity to individual officers. The United States relies on the common law, see Pet. App. 260a, 286a-288a, while the court below relied on the FSIA—a statute designed to codify the common law, see *id.* at 16a, 18a. Mere disagreement about the *source* of immunity, however, has no practical significance.

To the extent the United States perceives some difference in scope between common-law and FSIA immunity, it argues that common-law immunity is *broader* than FSIA immunity. It claims, for example, that common-law immunity is not subject to the FSIA's exceptions for commercial activities and the like. See Pet. App. 255a, 275a, 295a-296a; see also *id.* at 276a-277a, 296a-297a (other differences). Those differences cannot justify review here because the Second Circuit's opinion nowhere precludes individual officers from invoking the broader common-law immunity the government advocates. Notwithstanding petitioners' assertion that the Second Circuit "d[id] not recognize any continuing role for common law immunity," Pet. 19, the Second Circuit expressly left that issue open: "Because we decide this case on the ground that the FSIA protects individual government representatives in their official capacities, we *need not*

consider any continuing vitality of sovereign immunity under the common law." Pet. App. 18a (emphasis added). Thus, individual officials remain free to claim common-law immunity in the Second Circuit in all the circumstances the United States deems appropriate.

3. Petitioners nonetheless suggest that the Second Circuit's holding is "'rife with potential to disturb foreign relations'" because it subjects immunity decisions to a "rigid statutory regime" rather than "the common-law regime under which the State Department weighs foreign policy considerations in determining whether to waive immunity in a given case." Pet. 18 (quoting Pet. App. 286a-288a, 297a). Once again, petitioners misstate the United States' position. The United States did observe that common-law immunity entails deference to the Executive's case-specific recommendations. Pet. App. 286a-288a. But the reference to decisions "'rife with potential to disturb foreign relations'" relates to a different point—that FSIA immunity is potentially too *narrow*. *Id.* at 296a-297a. Nowhere did the United States suggest that not being able to recommend *denial* of immunity where the FSIA would otherwise provide it somehow threatens to "disturb foreign relations."

Nor would such a suggestion make sense. No foreign state would object to being granted *too much* immunity. And because the Second Circuit's opinion does not address common-law immunity, the United States remains free to urge that common-law immunity should be granted even when FSIA immunity is not available. Pet. App. 18a. That is hardly a prospect "'rife with potential to disturb foreign relations.'" Pet. 18.

Nor is there any real likelihood that the United States would recommend denial of immunity where the FSIA grants it. Discretionary foreign-policy factors have rarely played a role in the State Department's recommendations and have, in any event, uniformly *favored* immunity.

The State Department's compendium of recommendations from 1952 to 1977 concludes that, "[f]or the most part, diplomatic influences were resisted." *Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977* (M. Sandler, D. Vagts, & B. Ristau, eds.), in 1977 Dig. U.S. Prac. Int'l L. 1017, 1021 ("*Sovereign Immunity Decisions*"). In the "relatively infrequent" cases where such considerations played a role, *id.* at 1018, they resulted in more *expansive* immunity. See *id.* at 1044 (No. 32), 1049 (No. 41), 1068-1069 (No. 69), 1073 (No. 86); see also *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) ("On occasion, political considerations led to suggestions of immunity *in cases where immunity would not have been available* under the restrictive theory." (emphasis added)). And the few cases involving individual-officer immunity show no indication that diplomatic factors played any role. See, *e.g.*, *Sovereign Immunity Decisions* 1037 (No. 19), 1075-1076 (No. 96), 1076 (No. 97).[5] As a result, any disagreement over the scope of immunity under the FSIA—absent a concomitant disagreement over the availability of common-law immunity—lacks practical significance.

4. Even if the Second Circuit's opinion had suggested that the FSIA is the *exclusive* source of immunity for individual officers—and it did not—any disagreement with the United States still would not present a recurring and important issue. For 12 years after the FSIA's enactment in 1976, "courts appear[ed] not to have had occasion to address" whether individual officers were immune. Pet. App. 249a. When the Ninth Circuit decided *Chuidian* in 1990, it was "the first circuit court to consider whether the statute had any application to individ-

[5] The United States, moreover, did not—and does not—express a view in every case. See Pet. App. 287a. Thus, case-specific discretion is often irrelevant.

ual officials." *Id.* at 253a. Although the United States questions the Ninth Circuit's reasoning, it agrees that "*Chuidian*'s result was correct." *Id.* at 273a. Following *Chuidian*, the United States "[did] not file[] any brief revisiting the source of foreign official immunity" until it raised the issue in a statement of interest 16 years later. *Id.* at 272a n.11.[6] And in that case too, the United States disagreed only with the reasoning of the district court, not its result. *Id.* at 285a.

That absence of any real dispute over results is understandable. Because the FSIA "largely codif[ied] the existing common law of sovereign immunity," *Chuidian*, 912 F.2d at 1100, FSIA and common-law immunity substantially overlap. In most cases, therefore, the result is the same under either approach. The United States acknowledges that its common-law approach produces results "consistent with the results reached in the accumulated post-FSIA case law on point." Pet. App. 277a. For that reason, any disagreement between the case below and the United States' position is academic and unworthy of further review.

D. This Case Is A Poor Vehicle

Finally, even if there were some hypothetical set of facts in which the Second Circuit, the Seventh Circuit, and the United States would reach divergent results, this case would be an unsuitable vehicle for review. Whether immunity is grounded in the FSIA or the common law, one thing is certain here: The Princes are entitled to immunity. Petitioners concede that, if this Court were to reverse, the courts below could consider common-law

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[6] In *Enahoro*, for example, the United States filed an *amicus* brief that did not discuss sovereign immunity, arguing instead that the Alien Tort Statute did not supply a cause of action. U.S. Br. as *Amicus Curiae* 3-7, *Enahoro* v. *Abubakar*, No. 03-3089 (7th Cir. Feb. 20, 2004).

immunity on remand. Pet. 19 n.7. And there is no reason to believe that common-law immunity would be denied.

To the contrary, under the United States' approach, common-law immunity is a bright-line rule: Individual foreign officers "hold immunity from suit with respect to their official acts." Pet. App. 260a. Thus, the only relevant question is "whether the acts in question were performed on the state's behalf * * * as opposed to constituting private conduct." U.S. Statement of Interest at 24, *Matar* v. *Dichter*, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006); see also *id.* at 26 (actions "clearly undertaken in [the officer's] official capacity * * * cannot form the basis for a suit").[7] Once that threshold is met, immunity attaches—without regard to any FSIA exceptions. See Pet. App. 275a-276a. Because the United States considers common-law immunity to be broader than FSIA immunity, the Second Circuit's conclusion that the Princes are entitled to FSIA immunity forecloses any argument that they would be denied immunity under the United States' approach.

Petitioners nonetheless speculate that the State Department might "waive" the Princes' common-law immunity. Pet. 19 n.7. But they identify no case in which the Executive has ever recommended that immunity be *denied* even though general principles of law dictate that it be granted. As explained above, the State Department relies on case-specific diplomatic factors only rarely, and then only to *grant* immunity, not deny it. See pp. 20-21, *supra*. Petitioners offer no basis to think the State Department would depart from that settled practice here.

Diplomatic factors, moreover, could only support immunity here. The United States views Saudi Arabia as "an important partner in the campaign against terror-

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[7] Petitioners' excerpts from the *Dichter* statement of interest, Pet. App. 258a-283a, do not include the quoted passages.

ism," U.S. Dep't of State, *Background Note: Saudi Arabia* (Feb. 2008), http://www.state.gov/r/pa/ei/bgn/3584.htm, and has lauded the "strong, continuing efforts of the Saudi government in fighting that threat," *President Discusses Progress in Afghanistan, Iraq* (July 1, 2003), http://www.whitehouse.gov/news/releases/2003/07/20030701-9.html; see also *Press Briefing on the President's Visit with the Crown Prince of Saudi Arabia* (Apr. 25, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050425-9.html (war on terror is "an area where the United States and Saudi Arabia have worked very closely together and where the two leaders share a common strategy"). Even before 9/11, Saudi Arabia's and the Princes' support for U.S. efforts had caused bin Laden to declare war on them. See pp. 4-5, *supra*; see also 9/11 Report, *supra*, at 373 ("Saudi Arabia is now locked in mortal combat with al Qaeda."). The notion that the State Department would single out high-ranking officials of a key ally for arbitrary exclusion from the common-law immunity principles it applies in other cases is implausible in the extreme.

Moreover, granting review where, as here, dismissal is inevitable would undermine the fundamental purposes of sovereign immunity. Sovereign immunity is "immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation." *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526-527 (1985). Petitioners have already subjected the Princes to years of baseless litigation in derogation of that principle. This Court should not further prolong the proceedings based on an academic debate over the source of immunity when the result in this case is clear under any approach.

II. The Second Circuit's Holding That Terrorism Claims Cannot Be Brought Under The FSIA's Torts Exception Does Not Warrant Review

Petitioners also seek review of the Second Circuit's conclusion that they cannot circumvent the requirements of the FSIA's terrorism exception by invoking the non-commercial torts exception instead. But that ruling implicates no circuit conflict and does not warrant review.

A. There Is No Circuit Conflict

Petitioners describe their complaint as seeking damages for "provid[ing] material support to terrorist organizations." Pet. 1-2. That, of course, is precisely the conduct that the FSIA's terrorism exception addresses—the "provision of material support or resources" to terrorist acts. 28 U.S.C. §1605A(a)(1). Petitioners, however, cannot satisfy that exception. The terrorism exception requires that the defendant be designated a state sponsor of terrorism. *Id.* §1605A(a)(2)(A)(i). Saudi Arabia has not been so designated. See Pet. App. 31a; U.S. Dep't of State, *State Sponsors of Terrorism*, http://www.state.gov/s/ct/c14151.htm.

Petitioners attempt to avoid that limitation by invoking the general torts exception. The Second Circuit correctly rejected that end-run. If that tactic were permitted, the court noted, "[a]n important procedural safeguard—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a. Other courts have likewise "repeatedly rejected efforts to shoehorn a claim properly brought under one exception into another." *Id.* at 32a (citing Second, Fifth, and Ninth Circuit cases).

Petitioners insist (at 22) that the decision below conflicts with *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989). In *Liu*, the plaintiff alleged that foreign officials had conspired to murder her husband, and the Ninth

Circuit allowed the suit to proceed under the FSIA's torts exception. *Id.* at 1421, 1424-1426. The court did not consider the argument that the terrorism exception precluded jurisdiction. That exception did not even exist at the time. And, apart from one stray reference in an unrelated portion of the opinion, *id.* at 1433, the court did not even use the word "terrorism." Although petitioners now claim "[t]here can be no doubt that extrajudicial killing is an act of terrorism," Pet. 22 n.9, that is their characterization, not the court's. Because the Ninth Circuit did not consider (and could not have considered) the argument on which the Second Circuit relied, the claim of conflict is unfounded.

Petitioners similarly err in claiming (at 23-24) that the decision below is contrary to *Price* v. *Socialist Peoples' Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). In *Price*, two Americans sued Libya for gross mistreatment during their incarceration there. *Id.* at 86. They relied *solely* on the FSIA's terrorism exception, which the court held inapplicable. *Id.* at 85, 91-95. Except for one brief reference in background discussion, *id.* at 87, the court did not even mention the non-commercial torts exception, let alone address its interaction with the terrorism exception.

The only case that even arguably conflicts with the decision below is a single district court decision, *Doe* v. *Bin Laden*, 580 F. Supp. 2d 93, 96-98 (D.D.C. 2008). But that case is on appeal, see No. 08-7117 (D.C. Cir. docketed Oct. 29, 2008), and the existence of a solitary contrary district court decision is no basis for review in this Court.

B. This Case Is Not An Appropriate Vehicle

In any event, petitioners' suit would fail even under the FSIA's torts exception. That exception expressly excludes "any claim based upon the exercise or performance or the failure to exercise or perform a *discretionary*

function regardless of whether the discretion be abused." 28 U.S.C. §1605(a)(5)(A) (emphasis added). As both district courts held below, that exclusion plainly encompasses the governmental support for charities at the heart of the complaints here: "[D]eciding what disbursements should be made to Islamic charitable organizations" is precisely the sort of "'decision[] grounded in social, economic, and political policy'" that the discretionary-function exclusion covers. *Burnett* v. *Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 20-21 (D.D.C. 2003) (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 814 (1984)); Pet. App. 73a-75a, 162a-165a; pp. 7-8, *supra*.[8]

Because petitioners' claims would fare no better under the torts exception, this is not a suitable vehicle for review. Moreover, as explained above, see p. 24, *supra*, sovereign immunity is meant to spare defendants from the burdens of litigation, not merely potential liability. Further protracting this litigation against high-ranking Saudi officials despite the inevitability of dismissal would undermine that important purpose.

III. The Second Circuit's Personal Jurisdiction Holding Does Not Warrant Review

The Second Circuit's ruling on personal jurisdiction represents a straightforward application of settled principles to the particular facts of this case. Petitioners' unfounded assertions of conflict provide no basis for review.

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[8] The torts exception also requires that "*both* the tort *and* the injury * * * occur in the United States." *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984) (emphasis added). Here, the alleged tort—making charitable contributions that indirectly funded al Qaeda—occurred overseas.

A. The Court Of Appeals' Decision Does Not Conflict With This Court's Cases

Petitioners rested personal jurisdiction on their claim that "the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda, which then used the money to finance the September 11 attacks." Pet. App. 42a-43a. The court of appeals found that attenuated causal chain insufficient. Quoting *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), it held that petitioners had to show that the Princes "engaged in 'intentional, and allegedly tortious, actions * * * expressly aimed' at residents of the United States." Pet. App. 43a. That standard, the court held, was not met here. Although "[i]t may be the case that acts of violence committed against residents of the United States were a foreseeable consequence of the princes' alleged indirect funding of al Qaeda," petitioners had not shown that the Princes "'expressly aimed' intentional tortious acts" here. *Id.* at 44a (quoting *Calder*, 465 U.S. at 789). "Providing indirect funding to an organization that was openly hostile to the United States does not constitute this type of intentional conduct." *Ibid.*

Nothing in that analysis conflicts with this Court's precedents. Petitioners cite cases such as *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), and *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), for the proposition that it would not be "unfair or unforeseeable that the princes would face court proceedings in this country when al Qaeda did precisely what it committed to do with the prince's money." Pet. 27-28. As those cases explain, however, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction." *World-Wide Volkswagen*, 444 U.S. at 295; see also *Asahi Metal Indus. Co.* v. *Superior Ct. of Cal.*, 480 U.S. 102, 112-113 (1987) (plurality opinion). And actions directed only at a foreign intermediary are not enough—there must be "ac-

tions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475.

Petitioners caricature the Second Circuit's decision as erecting a categorical "bar on jurisdiction based on a defendant's provision of material support to terrorism directed at the forum." Pet. 27. But the Second Circuit held no such thing. The complaints do not allege that the Princes supported al Qaeda in order to finance an attack on the United States—only that they made donations to charitable organizations, knowing that the charities would divert funds to al Qaeda, an organization that was hostile to the United States. See Pet. App. 42a-44a. That causal chain, the court held, was "far too attenuated." *Id.* at 44a.

At bottom, petitioners disagree with the court's application of this Court's precedents to the facts of this case. But a mere claim of "misapplication of a properly stated rule of law" is not grounds for certiorari. Sup. Ct. R. 10. Yet that is all petitioners offer.

B. There Is No Circuit Conflict

Attempting to obscure the factbound nature of their claims, petitioners try to manufacture a circuit conflict. But the different results in the cited cases reflect different facts—not different views of the law.

For example, *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997), cited Pet. 28, involved manufacturers from Illinois and California. 132 F.3d at 1202. After the Illinois company rebuffed overtures at a licensing agreement, the California company "responded by threatening [the Illinois company's] customers," leading one New Jersey customer to stop purchasing. *Ibid.* The court found jurisdiction in Illinois because the defendant had "induc[ed] the customers of an Illinois firm to drop their orders." *Id.* at 1203. That case is clearly distinguishable

because, unlike the Princes, the defendant there "engaged in 'intentional, and allegedly tortious, actions * * * expressly aimed'" at a forum resident. Pet. App. 44a (quoting *Calder*, 465 U.S. at 789).

In *Panavision International, L.P.* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998), cited Pet. 28-29, an Illinois resident registered a California corporation's trademark as an Internet domain name and then demanded $13,000 from the California corporation for it. See 141 F.3d at 1317-1319. The Ninth Circuit found jurisdiction in California because the defendant had "directed his activity toward the forum state" by "engag[ing] in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision." *Id.* at 1322. The Princes, by contrast, did not "direct[]" any "activity" toward the United States.

Petitioners cite stray remarks in *Janmark* and *Panavision* to suggest that an "effect" on the forum state *alone* can support jurisdiction. See Pet. 28 (quoting 132 F.3d at 1202 and 141 F.3d at 1321). But those isolated statements are not holdings. And it obviously is not the law that a mere effect on the forum state establishes jurisdiction. See pp. 28-29, *supra*. Petitioners do not contend otherwise, see Pet. 26-28, so it is hard to see why they think those isolated comments justify review.

Petitioners' remaining cases are all readily distinguishable because, as the Second Circuit explained, they involved "primary participants in terrorist acts." Pet. App. 41a-42a. The defendants in *Mwani* v. *Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), for example, were al Qaeda and Osama bin Laden himself. *Id.* at 12. The court found personal jurisdiction because the defendants had "'engaged in unabashedly malignant actions directed at [and] felt in this forum'" by "orchestrat[ing] the bombing of the American embassy in Nairobi" and engaging in an "ongoing conspiracy to attack the United States, with

overt acts occurring within this country's borders." *Id.* at 13. Petitioners' district court cases (at 29-30) are similarly inapposite. See, *e.g.*, *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1327, 1336 (D. Utah 2006) (defendant held "several high-ranking al Qaeda positions," "provided substantial financial support and personnel assistance to help the group achieve its international terrorism objectives," and "actively participated in and helped plan al Qaeda's terrorist agenda").[9]

C. The Court Of Appeals' Decision Will Not Hamper Anti-Terrorism Efforts

Finally, petitioners implausibly suggest that the decision below will "undermine a broad range of counterterrorism measures" by "sharply limit[ing] the scope and enforceability of * * * criminal and civil statutes designed to address financial and other support provided to terrorist organizations." Pet. 31-32. The Second Circuit's fact-

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[9] To the extent petitioners invoke the recent decision in *Boim* v. *Holy Land Foundation for Relief & Development*, No. 05-1815, 2008 WL 5071758 (7th Cir. Dec. 3, 2008) (en banc), in reply, their reliance would be misplaced. That en banc decision—which dealt with liability under 18 U.S.C. §2333 (inapplicable to the Princes by virtue of 18 U.S.C. §2337)—does not address personal jurisdiction. The appellants there, moreover, all had significant and direct contacts with the United States: One was a naturalized citizen; two were U.S. corporations; and the fourth was merely an alter-ego or alternative name for one of the other corporations. *Boim* v. *Holy Land Found. for Relief & Dev.*, 511 F.3d 707, 713 (7th Cir. 2007). In any event, *Boim* recognizes that, where the defendant does not know or recklessly disregard that the donations will be channeled to terrorism, the defendant "is not liable." 2008 WL 5071758, at *15. Here, the district court sat as the factfinder for jurisdictional purposes, *Filetech S.A.* v. *France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998); cf. *Duke Power Co.* v. *Carolina Envtl. Study Group*, 438 U.S. 59, 77 (1978), and it found no basis for "infer[ring] that the Princes knew the charities to which they donated were fronts for al Qaeda." Pet. App. 161a; see pp. 2-3, *supra*. Petitioners' claims thus would fail under *Boim*.

bound ruling will have no such effect. The court held only that personal jurisdiction could not be based on an allegation that a defendant contributed to a foreign charity, knowing that the charity would divert funds to a terrorist group that was hostile to the United States. Pet. App. 42a-44a. Nothing in that holding addresses the provision of direct support to *terrorist organizations themselves*, or to intermediary organizations *for the purpose* of funding terrorist attacks on the United States. Here, moreover, the district court found that the allegations of the complaints were insufficient to support a finding that the Princes had the requisite knowledge. See p. 31 n.9, *supra*. And speculation that the Second Circuit's decision might impair the enforcement of other civil and criminal statutes that the Second Circuit's opinion does not address (on potentially different facts) is no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PRINCE MOHAMED AL FAISAL AL SAUD

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QUESTIONS PRESENTED

Petitioners argue that this case presents three questions:

1. Whether, for purposes of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(a), a claim against an "agency or instrumentality" of a foreign state encompasses a claim against an individual foreign official;

2. Whether tort claims brought against foreign states and officials based on acts of terrorism committed in the United States must meet the conditions of the FSIA's "state sponsor of terrorism" exception, 28 U.S.C. § 1605A, and cannot be brought under the FSIA's exception for non-commercial tort claims, 28 U.S.C. § 1605(a)(5); and

3. Whether the Due Process Clause precludes U.S. courts from exercising personal jurisdiction over individuals who provide material support to terrorists outside the United States, knowing those terrorists intend to commit terrorist attacks in the United States.

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IN THE

Supreme Court of the United States

No. 08-640

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent Prince Mohamed al Faisal al Saud ("Prince Mohamed") respectfully files this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

Prince Mohamed is the oldest living son of the late King Faisal of Saudi Arabia, and the older brother of respondent Prince Turki al Faisal al Saud. He is a citizen and resident of Saudi Arabia and has had no contacts with the United States that are material to this litigation. Unlike the other four princes who are respondents, he is not an official of the Saudi government.

Petitioners do not contend that Prince Mohamed was subject to the district court's general jurisdiction; they assert personal jurisdiction only on the theory that he "expressly aimed" or "purposefully directed" tortious activity toward the United States. But petitioners do not contend that Prince Mohamed had anything whatever to do with the September 11 attacks, or that he made any direct or indirect financial contribution to anyone. Their only pertinent specific contentions are that Prince Mohamed was chairman of one non-U.S. bank and chairman of the non-U.S. parent company of another non-U.S. bank, and the depositors in these banks allegedly included three individuals associated with terrorism.

This Court should deny certiorari. Petitioners' first two questions presented, raising issues under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f) and 1601-1611 (FSIA), are concededly inapplicable to Prince Mohamed. *See* Pet. 4. (His dismissal was not based on sovereign immunity.)

Petitioners state that the case presents a third question, concerning persons who allegedly "provide material support to terrorists outside the United States, knowing those terrorists intend to commit terrorist acts in the United States." Pet. (i). Petitioners explain the term "material support" as meaning "personal contributions the princes made to al Qaeda through its known charity fronts." Pet. 8. But that question, as petitioners argue it, has no application to Prince Mohamed. He is *not* one of the "Four Princes" (Pet. App. 5a-6a) who allegedly made charitable contributions, and petitioners do not allege that he made any

transfer of money or property to anyone.[1] The petition does not explain how the third question relates to the allegations against Prince Mohamed, or how any resolution of that question would affect the Second Circuit's decision affirming his dismissal for lack of personal jurisdiction.

The third question does not in any event merit this Court's review. Petitioners conceded below (Pet. App. 175a, 190a) that to establish personal jurisdiction over an individual with no significant contacts with the United States, they needed to allege facts showing that he committed a tortious act abroad that was "purposefully directed" or "expressly aimed" at the United States. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985); *Calder* v. *Jones*, 465 U.S. 783, 789 (1984). The Second Circuit's decision was a straightforward application of that well-established law to particular factual allegations. Pet. App. 40a; 45a (citing *Burger King*, 471 U.S. at 472; *Calder*, 465 U.S. at 789). There is no reason for this Court to review the conclusion of both courts below that allegations of chairing foreign banks that allegedly had a small number of questionable depositors do not meet the established tests.

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[1] The Federal Insurance plaintiffs had originally alleged that Prince Mohamed made "personal contributions to Saudi-based charities that he knew to be sponsors of al Qaida's global operations." First Am. Compl. ¶¶ 475-476. That allegation was withdrawn after Prince Mohamed's counsel wrote to their counsel noting that there could be no good-faith basis for such an allegation. *See* Stipulation signed and submitted to the district court August 26, 2004, and signed by that court and entered on the docket January 26, 2005 (Dkt. 640).

STATEMENT

After the terrorist attacks of September 11, 2001, numerous persons who suffered injuries and or property loss filed several lawsuits against hundreds of defendants, including governments and government officials, charities, banks, and individuals. Pet. App. 1a, 118a. The cases were consolidated for pre-trial proceedings in the United States District Court for the Southern District of New York.

At the requests of the *Ashton* and *Federal Insurance* plaintiffs, Prince Mohamed waived service of process in those cases, and he then filed motions to dismiss based on, *inter alia*, lack of personal jurisdiction. Pet. App. 118a-121a. The district court granted the motions on that ground. *Id.* at 194a.

The district court first explained that due process requires "minimum contacts" between a nonresident defendant and the forum. Pet. App. 175a. This requirement can be met where the defendant "purposefully directed his activities at residents of the forum" or where the defendant "expressly aimed" intentionally tortious conduct at residents of the forum state. *Id.* at 175a, 178a-179a (citing *Burger King*, 471 U.S. at 479, and *Calder*, 465 U.S. at 789). The district court noted that, as this test was explained in *Burger King* and *Calder* and has been applied by other federal courts in terrorism cases, the plaintiffs "must allege some personal or direct involvement by the Defendants in the conduct giving rise to their claims." *Id.* at 178a-179a (citing cases). Accordingly, to survive a motion to dismiss, the plaintiffs would have to allege "personal acts by Prince Mohamed by which he purposefully directed his activities at the United States by supporting Osama

bin Laden, al Qaeda, or their terrorist agenda." *Id.* at 194a.

The district court applied that standard to the factual allegations against Prince Mohamed and dismissed him. Pet. App. 191a-192a. Those allegations were that Prince Mohamed chaired a bank, Faisal Islamic Bank of Sudan, in which, at some unspecified time, someone associated with al Qaeda allegedly held a deposit account; and that Prince Mohamed chaired another bank, DMI, which had a Swiss subsidiary, Faisal Finance, in which two persons designated (after September 11) as supporters of terrorism (but not alleged to have had anything to do with the attacks) held deposit accounts. *Id.* at 192a. Because plaintiffs "have not alleged that Prince Mohamed had any knowledge or involvement in any al Qaeda accounts at any of the banks he chaired," and because any acts of those banks could not be imputed to Prince Mohamed, the court concluded that plaintiffs' allegations did not meet the *Burger King* and *Calder* standard. *Id.* at 194a.

The district court later dismissed the claims against Prince Mohamed in the remaining consolidated cases, after the plaintiffs conceded that the allegations and evidence in those other cases did not materially differ from the allegations in the cases already dismissed. Pet. App. 10a.

Plaintiffs appealed this partial final judgment, and the Second Circuit affirmed. Pet. App. 1a-3a. That court was primarily concerned with sovereign immunity issues applicable only to other appellees (the Kingdom of Saudi Arabia, one of its agencies, and four *other* princes who were officials of the Saudi government). The court also considered whether the district court had personal jurisdiction over the (other) "Four

Princes" in their individual capacities because of their alleged charitable contributions. *See id.* at 5a-8a, 41a-44a. Finally, the court of appeals considered whether the district court had personal jurisdiction over Prince Mohamed because of his alleged banking activities.

With respect to the personal jurisdiction issues, the Second Circuit first correctly stated this Court's constitutional standard for asserting personal jurisdiction based on actions taken outside the forum. It explained that "[d]ue process mandates that a defendant's 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" Pet. App. 40a (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)). Such "fair warning" is present, the court explained, if the defendant has "purposefully directed" his activities at the forum, or if the defendant has taken "'intentional, and allegedly tortious, actions ... expressly aimed'" at the forum state. *Id.* (quoting *Calder*, 465 U.S. at 789). The court further noted that this Court in *Calder* had allowed the exercise of personal jurisdiction under the "express aiming" test where the defendants were the "primary participants" in an alleged wrongdoing intentionally directed at a resident of the forum. *Id.* at 42a (quoting *Calder*, 465 U.S. at 790.)

Examining several decisions that had applied this standard in cases involving terrorism, the court noted that in those cases the defendant had either himself directed the attack, or commanded an agent to commit the attack, or personally authorized the attack. Pet. App. 41a-42a. None of these cases had allowed personal jurisdiction where a defendant had indirectly funded a terrorist organization, and the court concluded that allegations against four Saudi princes (not including Prince Mohamed)—that they had donated money to

charities that in turn had provided money to al Qaeda—did not constitute "express aiming" of tortious conduct at the United States. *Id.* at 42a-44a.

Turning to the allegations against Prince Mohamed, the court concluded that Prince Mohamed had not "engaged in 'intentional' conduct 'expressly aimed' at the United States" by virtue of his chairmanship of a financial institution that was alleged to have held an al Qaeda-associated deposit (or another firm whose financial-institution subsidiary was alleged to have held deposits of two other alleged supporters of terrorism). Pet. App. 45a. Moreover, since there were no allegations that the banks themselves had engaged in any business dealings in the United States, the court said Prince Mohamed could not be subjected to personal jurisdiction under New York's "fiduciary shield" doctrine. *Id.* at 46a. The Second Circuit therefore affirmed the district court's dismissal of the claims against Prince Mohamed for lack of personal jurisdiction.

REASONS FOR DENYING THE PETITION

The first two questions presented have no possible bearing on Prince Mohamed. The third question does not merit review in Prince Mohamed's case for two reasons. First, petitioners' argument on this question centers on the jurisdictional effect of charitable donations to Islamic charities, and there is no allegation that Prince Mohamed made any transfer of money or property to anyone. Second, the personal jurisdiction question does not merit review in any event. The decision below is not inconsistent with this court's precedent, is not in conflict with decisions of other circuits, and would not undermine counterterrorism efforts. The petition should be denied.

I. PETITIONERS DO NOT ARGUE THAT ANY OF THEIR QUESTIONS APPLIES TO PRINCE MOHAMED

While conceding (Pet. 4) that the first two questions have no application to Prince Mohamed, petitioners leave the lingering suggestion that their third question presented might somehow affect the outcome in his case. But they argue that question entirely in terms of charitable contributions allegedly made by the four *other* Saudi princes and make no attempt to apply their argument to Prince Mohamed's case.

Petitioners take issue with the Second Circuit's conclusion that under *Burger King* and *Calder* the allegations that the other Saudi princes made donations to certain charities were too attenuated to support personal jurisdiction. Pet. 26 (characterizing Second Circuit decision as "bar[ring] jurisdiction over persons who 'could and did foresee that recipients of their donations would attack targets in the United States.'"); Pet. 27-28 (arguing that the princes' donations to charities constituted "funnel[ing] money to al Qaeda" and that an attack was the foreseeable result of "the princes' money"); *see also* Pet. 4-8, 13 (describing allegations of donations to Islamic charities as the basis of petitioners' argument regarding personal jurisdiction). But there is no allegation that Prince Mohamed made any such donation, *see supra* note 1, and he is not mentioned in the pertinent section of the petition (Pet. 26-33) (or elsewhere except in routine recitals in the Statement).

Because the questions presented by petitioners could not affect the Second Circuit's decision affirming the dismissal of Prince Mohamed for lack of personal jurisdiction, the petition should be denied as to Prince Mohamed.

II. The Third Question Presented Does Not In Any Event Warrant This Court's Review

The third question presented does not in any event merit review by this Court. The Second Circuit straightforwardly applied well-settled law to the particular allegations before it. Its decision is fully consistent with the decisions of other circuits finding personal jurisdiction over persons who personally directed, or directly participated in, terrorist acts. And there is no basis for petitioners' claim that the decision will undermine U.S. antiterrorism efforts.

First, the decision below straightforwardly applies the well-settled legal standard for determining whether a defendant has sufficient "minimum contacts" with the forum to satisfy due process. Pet. App. 39a (quoting *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945)). The Second Circuit noted that a defendant can be brought into court based on wrongdoing outside the forum where the "defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 40a (citing *Burger King*, 471 U.S. at 462 and *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984)). The Second Circuit noted that this Court has also phrased this test as whether the defendant has taken "'intentional, and allegedly tortious, actions ... expressly aimed' at the forum state." *Id.* (citing *Calder*, 465 U.S. at 789). Although petitioners assert that the Second Circuit "depart[ed] markedly from this Court's precedents" (Pet. 26), they invoke precisely the personal jurisdiction test that the Second Circuit applied—whether the defendant purposefully directed or "expressly aimed" tortious conduct at the forum. Pet. 27

(citing *Calder*, 465 U.S. 789-790 and *Burger King*, 471 U.S. at 472).

Petitioners contend that the Second Circuit incorrectly applied the "purposefully directed" and "expressly aimed" tests by requiring that the defendant "directed" the terrorist attacks or "commanded an agent [or authorized al Qaeda] to commit them." Pet. 26; *see also* Pet. 29. But petitioners are misreading the Second Circuit. This Court in *Calder* explained that personal jurisdiction was proper, even though the defendants' only acts were outside the forum, because the defendants were "*primary participants* in an alleged wrongdoing" that was "expressly aimed" at a resident of the forum. 465 U.S. at 789-790 (emphasis added). The Second Circuit summarized the application of that test in several cases involving terrorist acts by noting the defendants there were "primary participants" because they had directed, commanded, or authorized the acts. Pet. App. 41a-42a. It did not hold that personal jurisdiction is proper *only* against those who direct or command a tortious act. In this case, it held that persons who allegedly made charitable donations (such as the other four princes) or a person who chaired a bank at which an alleged al Qaeda-related deposit account was held (such as Prince Mohamed) were not in any sense "primary participants" in the 9/11 attacks. There is nothing about the Second Circuit's decision in this regard that departs from this Court's precedents.

Other respondents will argue that there is no reason for this Court to review the application of the established personal jurisdiction standards to their cases, but this is certainly plain in the case of Prince Mohamed. The only asserted basis for personal jurisdiction over him was his chairmanship of non-U.S. financial institutions, one of which allegedly at some unspeci-

fied time held a deposit account for a person associated with al Qaeda and another of which had a subsidiary that held deposit accounts for persons designated (after September 11) as supporters of terrorism. *See supra* p. 3; Pet. App. 8a, 44a. The Second Circuit's conclusion that this did not constitute "purposefully direct[ing]" or "expressly aim[ing]" any tortious conduct at the United States (Pet. App. 44a-45a), was plainly correct.[2] It is not surprising that the petition simply ignores the factual allegations against Prince Mohamed, and his case would be an especially poor vehicle to re-examine the "purposefully directing" and "express aiming" tests because the factual allegations against him are so far removed from any reasonable interpretation of those terms.

Second, contrary to petitioners' claims, the Second Circuit's decision does not conflict with decisions of other circuits. Petitioners significantly mischaracterize the Second Circuit's opinion in an effort to demonstrate a circuit split.

Petitioners assert that the Second Circuit held that "the Due Process Clause ... bar[s] jurisdiction over those who provide material support to terrorists who target the United States." Pet. 3. The Second Circuit did not so hold. As just explained, the Second Circuit (as petitioners concede) applied this Court's "purpose-

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[2] The Second Circuit went on to note that there were no allegations that any of the banks Prince Mohamed chaired had conducted any business dealings in the United States (tortious or otherwise), and therefore Prince Mohamed could not be subject to personal jurisdiction under New York's fiduciary shield doctrine. Pet. App. 46a-47a. Petitioners do not take issue with this aspect of the Second Circuit's decision.

fully directed" or "expressly aimed" test for personal jurisdiction and concluded, for example, that the court lacked personal jurisdiction over Prince Mohamed because the factual allegations in this case were insufficient to show that he had "expressly aimed" any tortious conduct at the United States.

The cases petitioners cite for the purported split (Pet. 28-29) are all cases that also applied this Court's "expressly aimed" or "purposefully directed" test for personal jurisdiction.[3] Those courts reached different conclusions because they applied the same legal standard to very different allegations of fact. The differ-

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[3] *See Janmark, Inc.* v. *Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (applying personal jurisdiction test from *Calder* v. *Jones*, which finds jurisdiction proper where the defendant "expressly aimed" tortious activity at the forum and injury is felt in the forum); *Panavision International, L.P.* v. *Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (applying personal jurisdiction test from *Calder* v. *Jones*, noting that under *Calder* jurisdiction is proper where "(1) intentional actions (2) expressly aimed at the forum state (3) caus[ed] harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered-in the forum state"); *Mwani* v. *bin Laden*, 417 F.3d 1, 12-13 (D.C. Cir. 2005) (applying personal jurisdiction test from *Burger King*, noting jurisdiction is proper where the defendant "purposefully directed" tortious activity at the forum); *Morris* v. *Khadr*, 415 F. Supp. 2d 1323, 1336 (D. Utah 2006) (applying personal jurisdiction test from *Calder* v. *Jones*, noting that jurisdiction is proper where the effects of tortious acts are "directed at [and] felt" in the forum); *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54, 58-59 (D.D.C. 2003) (citing *Burger King* and noting that defendants could "reasonably anticipate being haled into court" in the U.S. because they had purposefully targeted and destroyed a commercial civilian aircraft likely to have Americans onboard); *Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38, 53-54 (D.D.C. 2000) (citing *Burger King* and noting that it was reasonable to exercise jurisdiction over foreign states that perpetrate terrorist acts against U.S. citizens).

ence in results is not surprising, and certainly does not evidence a circuit split.

On the contrary, the allegations in the cases petitioners cite as "conflicting" help to illustrate the vast gulf between the allegations in the present cases and proper allegations of "expressly aiming" or "purposefully directing" tortious activities at the United States. For example, petitioners argue that in *Mwani* v. *bin Laden*, 417 F.3d 1, 12-13 (D.C. Cir. 2005), the D.C. Circuit "flatly rejected" any requirement that the defendant "directed" or "committed" the tortious acts. Not so. The D.C. Circuit found that personal jurisdiction could be exercised over *Osama bin Laden* and *al Qaeda* because, by "orchestrat[ing]" the terrorist bombing of two U.S. Embassies in Africa, Osama bin Laden and al Qaeda had "purposefully directed" tortious acts at the United States. *Mwani*, 417 F.3d at 12-13.

Similarly, in *Morris* v. *Khadr*, the district court concluded that personal jurisdiction was properly exercised over a "long-time member of al Qaeda" who played a "leadership role" in the organization and "actively participated in and helped plan al Qaeda's terrorist agenda." 415 F. Supp. 2d 1323, 1328, 1336 (D. Utah 2006). The court concluded that the defendant, who had directly provided money and other support to al Qaeda, and who had actively encouraged his son to "join al Qaeda's ranks and attack American targets" (and whose son did in fact join al Qaeda and then participated in the attack that led to the plaintiff's death), had "purposefully directed" tortious conduct at the forum because he was a "personal or direct participant in the *conduct giving rise* to Plaintiffs' injuries." *Id.* at 1326, 1330, 1336.

The final two cases cited by petitioners, *Pugh* v. *Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003) and *Daliberti* v. *Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000) are similarly cases in which personal jurisdiction was properly exercised over a terrorist or a primary participant in a terrorist attack. In *Pugh*, personal jurisdiction was found proper over agents of the Libyan government (a state sponsor of terrorism) who had targeted and destroyed a civilian aircraft on an international flight that could be expected to have U.S. passengers. 290 F. Supp. 2d at 59. And in *Daliberti*, personal jurisdiction was proper over Iraq (then a state sponsor of terrorism) for the torture of U.S. citizens because, under *Burger King*, a state that perpetrates terrorist acts against U.S. citizens can reasonably expect to be held accountable in U.S. courts. 97 F. Supp. 2d at 53-54. The allegations against Prince Mohamed now at issue are not remotely analogous, and the Second Circuit properly dismissed the claims against him for lack of personal jurisdiction.

Third, petitioners' claim that the Second Circuit's decision will "undermine" U.S. counterterrorism efforts (Pet. 31) is unavailing. The United States has not accused Prince Mohamed (or any other respondent) of violating any law or supporting terrorism in any way. That Congress has enacted legislation, such as the Anti-Terrorism Act, 18 U.S.C. § 2339, that can reach extraterritorial conduct does not mean that Congress has dispensed with due process requirements for the exercise of personal jurisdiction in civil suits in U.S. courts. As this Court has directed, lower courts must still determine, as the Second Circuit did here, whether the facts alleged show that the defendant "purposefully directed" or "expressly aimed" tortious conduct at the forum. Contrary to petitioners' argument (Pet. 32), the

Second Circuit did not "sharply limit[] the scope and enforceability" of any counterterrorism statute. It simply reached a conclusion, after applying the correct legal standard to the facts alleged, that the allegations against Prince Mohamed and the other individual respondents did not show purposeful direction of tortious activities against the United States. Petitioners object to that essentially factual conclusion, but such an objection does not warrant this Court's review.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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IN THE
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FEDERAL INSURANCE COMPANY, ET AL.,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS HRH CROWN PRINCE SULTAN BIN ABDULAZIZ AL-SAUD, HRH PRINCE NAIF BIN ABDULAZIZ AL-SAUD, HRH PRINCE SALMAN BIN ABDULAZIZ AL-SAUD, AND HRH PRINCE TURKI AL-FAISAL BIN ABDULAZIZ AL-SAUD

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January 12, 2009

Respondents HRH Crown Prince Sultan bin Abdulaziz al-Saud, HRH Prince Naif bin Abdulaziz al-Saud, HRH Prince Salman bin Abdulaziz al-Saud, and HRH Prince Turki Al-Faisal bin Abdulaziz Al-Saud respectfully submit this supplemental brief pursuant to this Court's Rule 15.8 to advise the Court of the Fourth Circuit's recent decision in *Yousuf v. Samantar*, No. 07-1893, 2009 WL 40942 (4th Cir. Jan. 8, 2009). In that case, a panel of the Fourth Circuit held – as an alternative basis for decision – that "the FSIA does not apply to individuals." *Id.* at *1. Although the decision appears to diminish the consensus among courts of appeals that the FSIA applies to official-capacity suits against individuals, it provides no basis for this Court's review here.

First, *Yousuf* at most raises an academic issue concerning the *source* of sovereign immunity for individual officers; it raises no issue about whether immunity is available. As noted in the briefs in opposition, everyone agrees that individual officers are entitled to immunity for their official acts either under the FSIA or under the common law. Because common-law immunity is broader than the FSIA immunity the Second Circuit held to be available here, petitioners cannot proceed against the Princes even if they prevail on the question they seek to raise. *See* HRH Crown Prince Sultan et al. Opp. 22-24; HRH Prince Turki Opp. 25-26. The *Yousuf* court did not dispute that individual officers could claim common-law immunity, emphasizing that the defendant in that case remained "free to pursue on remand" his entitlement to "immunity . . . arising under pre-FSIA common law." 2009 WL 40942, at *11. And the concurrence in *Yousuf* underscored this point, observing that the panel's decision was "not [a] radical depar-

ture" from other authority because the decision was "in keeping with th[e] position" that "common law immunities" continue to apply. *Id.* (Duncan, J., concurring in part and concurring in the judgment).

For that reason, any disagreement in reasoning between *Yousuf* and the decision below lacks practical significance. What matters is *whether* officers are immune, not the *source* of their immunity. No court has ever suggested that the FSIA *eliminated* immunity for individual officers; nor has any court suggested that the common law would afford narrower immunity than the FSIA (which is hardly surprising because the FSIA codified common-law principles). Unless a dispute arises over the scope and availability of immunity, any conflict over the *source* of immunity is wholly academic.

Second, the decision in *Yousuf* is in any event unlikely to be the last word from the Fourth Circuit on the applicability of the FSIA to individuals. As an initial matter, it creates a direct conflict with that Court's prior decision in *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004), which held that the FSIA does provide immunity to government officials sued in their individual capacity.

The *Yousuf* panel purported to distinguish *Velasco* on the ground that *Velasco* addressed when "the acts of an individual operate to bind a foreign sovereign," not whether the FSIA applies to individuals. 2009 WL 40942, at *6-*7 (emphasis omitted). But that is incorrect. The plaintiff in *Velasco* sued the government of Indonesia and several officials "in their official capacities" for, *inter alia*, payment of a promissory note. 370 F.3d at 395-97. Following *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), and other cases, the *Velasco* court explained

that "[c]laims against the individual in [an] official capacity are the practical equivalent of claims against the foreign state." 370 F.3d at 399.

The court *then* addressed whether issuance of the promissory note constituted the commercial activity of a foreign state within the meaning of the FSIA's commercial activities exception (28 U.S.C. § 1605(a)(2)), such that the defendants (including the individual defendants) were not immune from suit. *See* 370 F.3d at 398. The court concluded that the promissory note was not issued pursuant to actual authority and that the commercial activities exception therefore did not apply. *See id.* at 401. The court thus held that "the District Court properly dismissed" all claims in the case, including the claims against "the individual Defendants . . . in their official capacities," because *all* defendants were "immune from suit under the FSIA." *Id.* at 402.

In light of that clear holding – which petitioners themselves have previously acknowledged, *see* Pet. 16 – the *Yousuf* panel's statement that *Velasco* did not address the issue is incorrect. That makes en banc review extraordinarily likely. The decision, moreover, is by its terms in conflict with "a majority of the courts," 2009 WL 40942, at *3, and its analysis is substantially incomplete even apart from its misreading of *Velasco*. The panel simply ignores, for example, the principle that an official-capacity suit is in every meaningful sense a suit against the "foreign state" itself and that the FSIA's use of "including" in the definition of "foreign state" means that the definition is illustrative, not exhaustive. *See* HRH Crown Prince Sultan et al. Opp. 13-14; HRH Prince Turki Opp. 24. The decision also fails to address Congress's recent amendment to the FSIA's terror-

ism exception. As the Second Circuit observed, that amendment "evince[s] congressional recognition that claims against individual officials of a foreign government must be brought within the confines of the FSIA." Pet. App. 21a. The *Yousuf* panel, however, did not acknowledge or address the current statutory language and instead appears to rest on an outdated version of the statute, rendering the decision subject to revisiting on that ground alone.

Given those many defects, and given that the analysis of whether the FSIA affords immunity to individual officers was unnecessary to the judgment in that case,* *Yousuf* has a dubious future even in the Fourth Circuit. Indeed, because *Yousuf*'s contrary holding came after *Velasco*, future Fourth Circuit panels will be required to follow *Velasco*, not *Yousuf*, even absent en banc review. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("[A]s to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions."). *Yousuf* thus does not support petitioners' request for review.

* * * * *

* After addressing that issue, *Yousuf* went on to hold that, regardless of whether FSIA immunity is available to individual officers generally, it was unavailable in that case because the defendant was a former rather than current government official. *See* 2009 WL 40942, at *10-*11.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

KINGDOM OF SAUDI ARABIA *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

The softness of the Government's opposition to certiorari, and its lack of fidelity to the traditional standards governing this Court's review, are hard to overstate. The Government describes at length how the Second Circuit erred in each of the three aspects of the decision at issue here. It agrees, as it must, that a circuit split exists regarding whether the Foreign Sovereign Immunities Act ("FSIA") governs claims against individual officials. It acknowledges that the Second Circuit's due process test is inconsistent with this Court's decisions, and effectively confirms the circuit split that exists over the scope of FSIA's non-commercial tort exception. Ignoring its prior, contrary filings, the Government uses the barest of pretexts to assert that the Second Circuit's errors and the circuit conflicts do not merit this Court's review.

The Government also provides this Court with no legal or policy basis to follow its apparent effort to appease a sometimes ally, filed on the eve of the President's trip to Saudi Arabia. The Government invokes no interest of state or diplomacy in recommending against review. Its core assessment that the legal issues presented here are unimportant ignores its prior assertions to the contrary, and its brief devotes not even a single sentence to the harm suffered by the 9/11 victims, the public interest in permitting the victims their day in court, Congress's intent to authorize state tort claims against foreign states and civil enforcement of counter-terrorism laws, or the consequences of closing courthouse doors to future victims of terrorist attacks in the United States. The Government makes no effort to describe the events of September 11, 2001 or their national

significance, or to defend the obvious non-legal factors that cause it to bow to respondents. The Government's legal analysis confirms that this case satisfies the usual standards justifying review, and therefore the Court should grant the petition.

ARGUMENT

1. *FSIA's Application to Individual Officials.* The Government explains at length why the Second Circuit erred in concluding that FSIA determines the scope of suits against foreign officials. U.S. Br. 6-8. It concedes that the courts of appeals are deeply split over this issue, with the Fourth and Seventh Circuits in conflict with the Second and Ninth Circuits in particular. *Id.* 8. It even points to the practical harm caused by the Second Circuit's decision. *Id.* 7 (Congress did not "intend[ ], as would follow from the court of appeals' ruling, that the personal property of every official or employee ... would be available for execution to satisfy a ... judgment against the state"); *id.* ("the FSIA's focus on the status of an entity ... at the time suit was filed would mean ... that a plaintiff could circumvent that immunity by waiting until an official left office" (citation omitted)).

The Government's claim that review is nonetheless unwarranted because the circuit split "appears to be of limited practical consequence," *id.* 8, is wrong for three reasons. *First*, the courts of appeals are not consuming pages of the Federal Reporter in a pointless exercise. As they understand, FSIA, if it applies, creates broad exceptions to officials' immunity that often did not exist for officials under the common law and creates immunity where no common law immunity existed. *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990), which several other circuits have applied without elaboration and which the Second Circuit

followed here, clearly holds that FSIA displaces common law immunity altogether. Thus, for example, a foreign official sued in a commercial dispute or for a tort is subject to suit under FSIA's exceptions to immunity, see 28 U.S.C. § 1605(a)(2), (5), but would generally be immune from suit under the Seventh and Fourth Circuits' tests. As noted, FSIA does not extend to former officials. The Government acknowledges these effects. U.S. Br. 9-10. Conversely, the Ninth and Second Circuits' approach provides immunity to all officials without regard to the various exceptions applicable to common law immunity, as in this case (see *infra* 4-5). In sum, the source of any immunity carries extremely important consequences that support, rather than counsel against, review by this Court.

Second, the Government itself has repeatedly argued to other courts that the *Chuidian* approach has very significant practical consequences, including risks to U.S. personnel. In *Chuidian*, and then in three recent filings, the Departments of State and Justice outlined the adverse consequences of adopting the Ninth (and, now, Second) Circuit's reasoning. See Pet. 17-20, 247a-298a. Those filings warned of the "problematic results" and "troubling practical consequences" of the Ninth Circuit's approach, *id.* 251a, 275a, 295a, and pointed to the Executive Branch's reduced role in determining immunity, the inequity of attaching foreign officials' personal assets, the possible exposure to punitive damages, the erosion of immunity, and the inconsistency between international law and FSIA liability. *Id.* 255a-257a, 275a-283a, 295a-298a. Most importantly, the Government warned that the *Chuidian* approach posed risks to U.S. personnel when foreign states act reciprocally and lessen U.S. officials' protections

against foreign suits, and the "critical importance" of avoiding that result. *Id.* 281a-283a (also invoking, to the same effect, *Boos* v. *Barry*, 485 U.S. 312, 323-24 (1988)), 296a. It is shocking that the Government now fails to defend that interest before this Court, without even mentioning the threat to U.S. personnel or its prior, contrary filings.

Third, the Government is wrong even if the focus were appropriately limited to further proceedings in this case alone. The Government simply asserts, incorrectly, that the Saudi princes would receive immunity because "the Executive also would recognize such immunity." U.S. Br. 8; see *id.* 9 n.3. That immunity determination is ultimately a *judicial* one, influenced but not determined by the Executive's recommendation. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). As the Government has elsewhere argued, *e.g.*, *infra* 14a-15a, these issues are complex and require detailed judicial consideration, particularly in this case: officials' entitlement to immunity for *jus cogens* violations, including supporting terrorism, is highly contested, and even the Government admits that foreign officials who run quasi-commercial entities, such as certain of the "charities" at issue here, may well not be entitled to immunity. See U.S. Br. 10.

As importantly, the Executive has made no formal immunity recommendation in this case, and a bare *amicus* brief statement of the likelihood of doing so is hardly the same. Traditionally, the Executive's immunity recommendation follows contested proceedings and is supported by ample justification subject to public and judicial scrutiny. See, *e.g.*, *Ex Parte Peru*, 318 U.S. 578, 581 (1943); *Sovereign Immunity Decisions*, 5 Digest U.S. Prac. Int'l L. 1017, 1019 (State Dep't 1977). Here, the Government seeks

the benefit of the immunity conclusion without assuming the burdens of proceedings or defending its analysis. The Government would be far less cavalier in its immunity assessment if forced to explain in open court why uncertain immunity principles require dismissal of claims regarding the worst terrorism attack committed on American soil. Presumably for this reason, the Government chose not to recommend immunity despite the district court's request, earlier in this very case, for its participation.

2. *The Non-Commercial Tort Exception.* The Second Circuit's holding regarding the scope of § 1605(a)(5) is indefensible: Congress could not have intended to preclude all tort claims for terrorism-related harm in the U.S. pursued against any but the few foreign states designated as state sponsors of terror. See Pet. 21-25. Understandably, the Government attacks the Second Circuit's reasoning and flatly rejects its holding. U.S. Br. 12-13. Less understandably, the Government never explains why the implications of that gross error for victims of terrorism do not warrant review.

Instead, the Government declines to recommend review because it believes petitioners would not prevail under a different construction of § 1605(a)(5), whereby only claims based on officials' acts within the U.S. are authorized. *Id.* 14-15. The Second Circuit did not remotely rely upon this theory, which should suffice to rebut the Government's entire treatment of whether this Court should review the *Second Circuit's* interpretation of § 1605(a)(5). Review is merited because the decision below on that question is wrong and conflicts with other courts of appeals.

Beyond that, the Government's construction provides no basis for declining review for several additional reasons. *First*, the statute's language provides absolutely no basis to conclude that § 1605(a)(5) stops at the nation's borders. It authorizes recovery for harm "occurring in the United States," and does not distinguish between a foreign official who arranges the bombing of Washington, D.C. from Beirut and one who does so from Chicago. Congress expressly chose to bar certain tort claims, see § 1605(a)(5)(B), but there is no exception for claims asserting secondary liability.

Second, the Government's theory does not reflect established law. Terrorism decisions of the Ninth Circuit and the D.C. district courts are squarely to the contrary. See *infra* 8-9; Pet. 22-23. The Government's view has been adopted, in part, in only one decision, unrelated to terrorism and subject to review by this Court. See *O'Brien* v. *Holy See*, 556 F.3d 361 (6th Cir. 2009), *cert. filed*, No. 08-1384 (May 7, 2009). That decision could be read as precluding recovery under § 1605(a)(5) for acts committed abroad, even where a tort is committed in the U.S. The same is not true for the other cases the Government invokes. Those cases, and especially *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), hold only that a tort committed abroad cannot support a suit under § 1605(a)(5) even if victims are indirectly harmed in the United States. See Pet. Reply 6-7. They simply do not hold that § 1605(a)(5) is inapplicable where, as here, a complete tort occurs in the United States (*i.e.*, hijacked domestic flights are deliberately crashed into U.S. buildings) and state tort law recognizes secondary liability based in part on acts occurring abroad. Even

respondents do not misread *Amerada Hess* in this manner.

Third, decisions of this Court and other courts are to the contrary. The Government's theory that § 1605(a)(5) truncates secondary liability under state tort law directly contradicts this Court's injunction that FSIA is "not intended to affect the substantive law determining the liability of a foreign state." *First Nat'l City Bank* v. *Banco Para el Comercio*, 462 U.S. 611, 620 (1983); see *Kilburn* v. *Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128-29 (D.C. Cir. 2004).

Fourth, the Government fails to mention its previous assurance to the courts that § 1605(a)(5) supports claims in precisely the circumstances here. In *Kilburn*, Libya argued (much as the Second Circuit held) that § 1605(a)(7) provided the exclusive mechanism for terrorism victims' redress and thereby preempted state law claims. The Government disagreed:

> The potential for overlap between Sections 1605(a)(5)—domestic torts—and 1605(a)(7) offers further reason to reject Libya's argument that state common law has been preempted as a source for causes of action in litigation under Section 1605(a)(7). *For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7).*

Infra 7a (emphasis added).

Fifth, petitioners' claims survive even under the Government's theory because petitioners *do* allege, with considerable specificity, that Saudi agents operating in the U.S. contributed to the 9/11 attacks. See U.S. Br. 16 n.4. Although the Second Circuit did not address this issue, the Government asserts that

this Court must disregard these allegations because the Government prefers its own evidence, see *id.*, or because the pleadings are inadequate. Actually, considerable support for the allegation exists, even beyond the claims the Government struggles to discount.[1] Those claims are hardly the "'formulaic recitation'" of legal elements condemned in *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). No reason exists for the Court to prejudge issues that are not before it and that the Court would leave on remand if it reverses.

Separately, the Government confirms that a conflict exists between the Second and Ninth Circuits regarding the scope of § 1605(a)(5). The Government acknowledges that both *Liu* v. *Republic of China*, 892 F.2d 1419 (9th Cir. 1989), and *Letelier* v. *Chile*, 488 F. Supp. 665 (D.D.C. 1980), involved terrorism-related claims brought under § 1605(a)(5). U.S. Br. 17. It states that "those cases are distinguishable because they involved acts in the United States directly attributable to the foreign governments," *id.*, but this has nothing to do with the reasoning of either court, which in fact rested liability on foreign officials' acts abroad. See *Liu*, 892 F.2d at 1422-23, 1431-32; *Letelier*, 488 F. Supp. at 674 (Chilean officials' actions were "carried out entirely within" Chile); see also *Doe* v. *bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008). Nor did the Second Circuit suggest that petitioners could rely on § 1605(a)(5) to the extent that Saudi officials acted in the U.S. Quite the contrary: the Government correctly notes that the Second Circuit broadly held that § 1605(a)(5) does not authorize terrorism-related claims against foreign states other than designated

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[1] *See, e.g.*, the First Amended Complaint (¶¶ 115, 169) and hundreds of pages of substantiation accompanying the opposition to the Kingdom's motion to dismiss.

state sponsors of terror, see U.S. Br. 12-13, thus confirming rather than dispelling the circuit split between the Second and Ninth Circuits.

3. *Due Process and Material Support of Terrorism.* The Second Circuit held that the Due Process Clause requires dismissal of claims, as legally insufficient, that the Saudi princes "could and did foresee that recipients of their donations would attack targets in the United States" and "intended to fund al Qaeda through their donations" knowing of al Qaeda's "jihad against the United States." Pet. 43a-44a. The Government agrees with petitioners that this conclusion "is incorrect" and inconsistent with *Calder* v. *Jones*, 465 U.S. 783 (1984). U.S. Br. 19.

The Government declines to recommend review, however, based on a disingenuous and incorrect assertion that the Second Circuit's decision could possibly be read as "focus[ing] on the inadequacy of the particular allegations before it," thus "comport[ing] with the opinions of the district court." *Id.* 19-20. The Second Circuit could not have been clearer that it rejected the district court's reasoning and was *not* resting its decision on the complaint's insufficiency. The panel "accept[ed] [the complaint] as true at the pleading stage," Pet. 3a, and, for the point most relevant here, found that "[t]hese allegations include a wealth of detail (conscientiously cited to published and unpublished sources) that, if true, reflect close working arrangements between ostensible charities and terrorist networks, including al Qaeda." *Id.* 5a. The panel fully accepted, for purposes of its decision, that the princes "caused money to be given to the Muslim charities ... with the knowledge that the charities would transfer the funds to al Qaeda," *id.* 6a, and otherwise supported the charities knowing that they were funding terrorist

groups that targeted the U.S. *Id.* 6a-8a. No portion of the opinion calls into question the adequacy of petitioners' allegations.[2]

Nor is there merit to the Government's assertion that a "circuit split is doubtful" because cases cited by petitioners involved "primary wrongdoer[s]." U.S. Br. 20. Circuit splits are established by decisions' holdings, which here rested on whether defendants engaged in tortious actions that caused injuries in the U.S., not primary versus secondary liability. See *Mwani* v. *bin Laden*, 417 F.3d 1 (D.C. Cir. 2005); *Panavision Int'l* v. *Toeppen*, 141 F.3d 1316 (9th Cir. 1998); *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997). Each of those holdings would clearly have yielded outcomes at odds with the Second Circuit's if applied to this case; hence a circuit split exists. Combined with *Janmark*, the Seventh Circuit's recent conclusion that supporters of terrorism are themselves primary wrongdoers, and its treatment of intention and harm, make the existence of a conflict especially clear. See *Boim* v. *Holy Land Found.*, 549 F.3d 685 (7th Cir. 2008) (en banc); Pet. Reply 9-11; *infra* 17a-18a (Government previously argued in *Boim* that no distinction exists in terrorism context between primary and secondary tortfeasors).

The Government's dismissal of the counter-terrorism implications of the Second Circuit's

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[2] The Government cites two portions of the opinion, but both actually contradict the Government's point: it refers to "causal chain," which the balance of the same sentence confirms as meaning "the Princes supported Muslim charities knowing that their money would be diverted to al Qaeda," Pet. 42a-43a, and to "indirect funding of al Qaeda," which immediately follows the statement that the analysis assumes the princes "intended to fund al Qaeda through their donations to Muslim charities" knowing that al Qaeda targeted U.S. interests. *Id.* 43a-44a.

decision is particularly troubling. The Government professes no concern that the Second Circuit has imposed, as a constitutional matter, a heightened notice standard that benefits material supporters of terrorism abroad. U.S. Br. 21. Although the Government has largely prevailed against increasing due process challenges from terrorism financiers, defendants, and extraditees, it misjudges their ability to deploy such a powerful new principle.

The Government also is clearly wrong in suggesting that the Second Circuit's decision does not limit "the legislative jurisdiction of Congress to apply federal law extraterritorially." *Id.* The Second Circuit did precisely that in this very case. Through 18 U.S.C. § 2333, Congress authorized civil suits arising from incidents of terrorism as an important component of the nation's counterterrorism efforts, focused in large measure on ending extraterritorial support for terrorism. Indeed, petitioners have brought just such a § 2333 claim against the Saudi princes in their individual capacities. See *infra* 17a-26a (Government previously argued § 2333 extends to secondary liability). For this and subsequent cases, the Second Circuit has created a constitutional bar to use of § 2333 against supporters of terrorism who act abroad.

In a striking departure from its traditional role, the Government has thus declined to defend a federal statute against significant constitutional limitation. Indeed, it fails even to mention the issue before this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

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SUPPLEMENTAL APPENDIX

PETITIONERS' SUPPLEMENTAL APPENDIX A

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 03-7117.

BLAKE KILBURN, INDIVIDUALLY ON HIS OWN BEHALF,
AND AS EXECUTOR OF THE
ESTATE OF PETER C. KILBURN,

Deceased Appellees,

v.

ISLAMIC REPUBLIC OF IRAN AND
IRANIAN MINISTRY OF INFORMATION AND SECURITY,

Appellees.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA AND
LIBYAN EXTERNAL SECURITY ORGANIZATION,

Appellants.

On Appeal from the United States District Court for
the District of Columbia

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* * * *

[1] INTEREST OF THE UNITED STATES

The United States submits this *amicus curiae* brief pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a). This case concerns the proper interpretation of federal statutes respecting litigation in the courts of the United States by victims of state-sponsored terrorism. The first of these, Section 1605(a) (7) of the Foreign Sovereign Immunities Act ("the FSIA"), 28 U.S.C. §§ 1330, 1602-1611, "abrogates the immunity of foreign states from the jurisdiction of [United States] courts in [2] lawsuits for damages for certain acts of terrorism." *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1034 (D.C. Cir. 2004). The second statute, the "Flatow" Act, reprinted at 28 U.S.C. § 1605 Note, "creates a private right of action against officials, employees, and agents of foreign states ... in their *individual* ... capacities." *Cicippio-Puleo*, 353 F.3d at 1034. Because of the sensitive foreign policy nature of such statutes, their application is of great concern to the Executive Branch.

Appellant Libya urges this Court to hold that Congress's creation, in the Flatow Act, of a cause of

action exclusively against foreign state officials preempts any cause of action against the foreign state itself under state or local foreign law. In our view, the Court should reject Libya's arguments..

In Sections 1605(a)(7) and 1606 of the FSIA, Congress provided a meaningful avenue for terrorism victims to recover against foreign terrorist states "in the same manner and to the same extent as [against] a private individual under like circumstances," 28 U.S.C. § 1606. When, in the Flatow Act, Congress provided these victims of terrorism with an *additional* remedy against responsible foreign officials in their individual capacities—thereby creating an additional deterrence to such acts—it did not relieve foreign states of their own liability.

Plaintiffs go too far, however, when they argue that the Court should read Section 1606 as extending to foreign states the liability that Congress imposed on individual foreign officials [3] in the Flatow Act and the Torture Victim Protection Act. Congress expressly limited these remedies to a narrow class of defendants, and the Court should not, without clear indication from Congress, take the provocative step of extending that cause of action to foreign states themselves.

* * * *

[13] **ARGUMENT**

I. CONTRARY TO LIBYA'S CONTENTION, NEITHER SECTION 1605(a)(7) NOR THE FLATOW PROVISION PREEMPTS OTHERWISE AVAILABLE CAUSES OF ACTION UNDER APPLICABLE STATE OR LOCAL FOREIGN LAW.

In *Cicippio-Puleo*, this Court held that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1033. From this, Libya makes the unwarranted leap to a position that Section 1605(a)(7) and the Flatow Act affirmatively *preempt* causes of action that would otherwise be available against a foreign government under state or local foreign law. *See* Libya Br. at 19-24. Nothing in the FSIA, the Flatow Act, or the decision in *Cicippio-Puleo* supports that view, which is incorrect.

A. The FSIA, as originally enacted, "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983). *Accord Cicippio-Puleo*, 353 F.3d at 1033 (quoting same). Indeed, the Act's legislative history expressly disavows any such intent, stating that "[t]he bill is not intended to affect the substantive law of liability." H.R. Rep. No. 94-1487, at 12 (1976).

[14] Section 1606 of the FSIA confirms this point, as it provides that, when a foreign state's immunity is lifted, that entity is subject to the same, pre-existing, legal rules that apply to private individuals generally. Section 1606 says that "as to any claim for relief with respect to which a foreign state is not

entitled to immunity under ... this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Ibid.* The section further provides a special rule of damages where, in a wrongful death action, "the law of the place where the action or omission occurred provides" only punitive damages. *Ibid.*

Congress's express recognition that, at least in some circumstances, the law that would determine the liability of "a private individual under like circumstances" would be "the law of the place where the action or omission occurred," demonstrates that Congress did not categorically preempt state and local foreign law, as Libya claims. The Supreme Court so recognized in *First National City Bank*, stating that, under Section 1606, "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." 462 U.S. at 622 n.11. *See also Bettis*, 315 F.3d at 338 ("we are bound to look to state law in an effort to fathom the 'like circumstances' to which 28 U.S.C. § 1606 refers").

[15] Nearly identical language in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, has likewise been construed to embrace, rather than preempt, state law. Like the FSIA, the FTCA removes the defense of sovereign immunity for certain tort claims, thereby making the United States liable "in the same manner and to the same extent as a private individual under like circumstances," *id.* § 2674, *i.e.*, where "a private person would be liable ... in accordance with the law of the place where the act or omission occurred," *id.* § 1346(b)(1). Indeed, the language in Section 1606 (originally

contained in Section 1605(c) of the draft legislation) was modeled on Section 2674 of the FTCA. *See* Cong. Rec. S17468 (June 10, 1976) (analysis of Departments of State and Justice accompanying transmittal of proposed legislation). In light of the Supreme Court's holding that these FTCA provisions subject the United States to liability according to state law, *see, e.g., United States v. Muniz*, 374 U.S. 150, 153 (1963), *Richards v. United States*, 369 U.S. 1, 6-7, 11 (1962), Congress's use of nearly identical language in the FSIA cannot possibly be construed to *foreclose* application of state law to foreign states.

Notably, in the context of both the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), and domestic tort exception, *id.* § 1605(a)(5), courts frequently apply substantive state or local foreign law. *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, [16] 87 (2d Cir. 2002) (Indonesian law), *cert. denied*, 123 S. Ct. 2256 (2003); *Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 958, 961 (2d Cir. 1991) (Chinese law); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987) (California law), *cert. denied*, 485 U.S. 905 (1988); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1004 (9th Cir. 1987) (Polish law).

There is nothing unique about Section 1605(a)(7) that would, in contrast to the other FSIA exceptions, altogether preclude state or local foreign law causes of action. As the Court held in *Cicippio-Puleo*, Section 1605(a)(7), like the FSIA's other immunity exceptions, "merely abrogates the immunity of foreign states from the jurisdiction of the courts." 353 F.3d at 1034. Though Section 1605(a)(7) does not, itself, create a cause of action against foreign states, *ibid.*,

its legislative history negates any inference that Congress intended to preclude application of independently existing causes of action. *See* H.R. Conf. Rep. No. 104-518, 112 (1996) (section "permits U.S. federal courts to hear claims seeking money damages for personal injury or death against [designated terrorist] nations"). Similarly, Congress's provision that the amendment would "apply to any cause of action arising before, on, or after the date of the enactment of this Act," Pub. L. 104-132, § 221(c), indicates its recognition that such causes of action existed prior to Section 1605(a)(7)'s enactment, and would continue to do so.

[17] The potential for overlap between Sections 1605(a)(5)—domestic torts—and 1605(a)(7) offers further reason to reject Libya's argument that state common law has been preempted as a source for causes of action in litigation under Section 1605(a)(7). For example, in cases of terrorism on U.S. territory, such as the September 11 attacks, jurisdiction might properly be founded on both paragraphs (a)(5) and (a)(7). If state law provides the cause of action for a suit under paragraph (a)(5), there is no reason to believe that Congress intended to foreclose state law from providing a cause of action merely because the plaintiff invoked paragraph (a)(7) rather than paragraph (a)(5).

B. Libya argues that Congress's creation, in the Flatow Act, of a cause of action for the kinds of acts encompassed within Section 1605(a)(7), but which is available only against foreign state officials, reflects Congress's intent to *replace* foreign state liability entirely with the liability of individual foreign officials. But nothing in the Flatow Act compels, or even supports, such a conclusion. That provision does not, by its terms or structure, occupy the entire field

of claims arising out of state-sponsored terrorism. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Nor does the existence of claims directly against foreign states in any way impair Congress's objectives in making foreign officials individually liable. *Cf. Hines v. Davidowitz*, 312 U.S. [18] 52, 67 (1941) (federal law preempts state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal policy); *American Insurance Association v. Garamendi*, 123 S. Ct. 2374, 2391-92 (2003).

The Flatow Act is simply silent with respect to the liability of foreign states. And there is no indication that Congress intended to diminish the remedies it had permitted plaintiffs to pursue only months before when it lifted foreign states' immunity for claims of state-sponsored terrorism. To the contrary, the Conference Report accompanying the Flatow Act states: "The conference agreement inserts language *expanding the scope of monetary damage awards available* to American victims of international terrorism." H.R. Conf. Rep. No. 104-863, 985 (1996) (emphasis added).

There is no inherent inconsistency in limiting the new federal cause of action in the Flatow Act to suits against individual foreign officials, while leaving foreign states subject to the same generally-applicable rules of liability that apply to private individuals. The remedy against the individual serves an additional deterrent effect, while the remedy against the state may, in some cases, offer the injured party a greater likelihood of recovery. *Cf.* 28 U.S.C. § 2679(b)(2)(A) (availability under the FTCA of claim against the United States [19] based on state law

does not foreclose *Bivens* suit against federal official).[5]

The Flatow Act's particularly broad definition of recoverable damages, coupled with its retroactive application, *see* H.R. Conf. Rep. No. 104-863, 985 ("this section shall apply to cases pending upon enactment of this Act"), could also explain why Congress chose to extend the new cause of action only to foreign officials, while leaving existing remedies against foreign states in place. Congress might well have been willing to take the "significant step" of subjecting individual foreign officials to expansive, retroactive liability while deciding not to take the "even greater step" of subjecting foreign states to such liability. *See Cicippio-Puleo,* 353 F.3d at 1036.

While Congress plainly chose not to subject foreign states to additional liability under the Flatow Act, the continued viability of state or local foreign causes of actions against foreign states in no way undermines the federal statutory scheme.

C. While neither Section 1605(a)(7) nor the Flatow Act categorically precludes application of state law causes of action against foreign countries, we note that the FSIA and various constitutional principles may constrain application of state law [20] in a given suit that, like this one, arises in a foreign country's territory.

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[5] We note that, in the domestic context, a plaintiff may be precluded from obtaining relief against *both* the United States and an individual officer. *See* 28 U.S.C. 2676. No issue of double recovery is presented in this case, so the Court need not address what would happen in the event a plaintiff attempted to recover both against a foreign sovereign under applicable state law and against a foreign official under the Flatow Act.

As previously noted, the FSIA contemplates that, at least in some circumstances, the applicable law will be "the law of the place where the action or omission occurred," 28 U.S.C. § 1606, which, in this case, is Lebanon. On remand, the district court may have to decide whether the law of Lebanon or some other jurisdiction applies and, moreover, whether the choice of law analysis is governed by the law of the forum or by uniform federal principles - a question as to which the circuits are in disagreement. *See Karaha Bodas Co.*, 313 F.3d at 84 ("the FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law"); *Liu v. Republic of China*, 892 F.2d 1419, 1425-26 (9th Cir. 1989) ("the federal choice of law rule controls the applicable law of respondeat superior both for jurisdiction under the FSIA and on the merits"), *cert. dismissed*, 497 U.S. 1058 (1990); *Harris*, 820 F.2d at 1003 (same). *See also DuMont v. Saskatchewan Government Insurance*, 258 F.3d 880, 886 (8th Cir. 2001) ("there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern").[6]

[21] Where, as here, the injury occurred abroad, the FSIA and constitutional principles limiting the power of the states might independently prevent a U.S. state from applying its domestic law. Even in the domestic context, several constitutional provisions

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[6] Plaintiffs' research (see Pls. Br., 48) indicates that they may have a cause of action under both Lebanese law and the law of the potentially relevant U.S. jurisdictions. On remand, the district court will have to determine whether the elements of the respective causes of action and damages available under the laws of the various jurisdictions differ. If they do, the court may need to resolve the choice of law issue.

limit a state's ability to project its substantive law extraterritorially. *See, e.g., BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 572 (1996) (Due Process Clause); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (Commerce Clause); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality) (Full Faith and Credit Clause). These limitations also restrict a court's ability to apply the forum state's law to extraterritorial conduct pursuant to choice-of-law analysis. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816-17 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality).

Projection by a state of its legal norms onto foreign nations when the relevant actions occur abroad could present even greater problems of extraterritoriality, disuniformity, and interference with United States foreign policy. *Cf. Garamendi*, 123 S. Ct. at 2390-92; *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-449 (1979); *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968). Indeed, even federal statutes are presumed not to apply extraterritorially in other nations, unless Congress clearly indicates otherwise. *See EEOC v. Arabian American Oil* [22] *Co.*, 499 U.S. 244, 248 (1991) (rule "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord").

Furthermore, while some of these constitutional limitations do not protect foreign states directly, *see, e.g., Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002) (foreign states not entitled to Due Process Clause protection), the FSIA itself may well prevent states from applying to foreign sovereigns substantive rules that would not apply to "private individuals in like circumstances." 28 U.S.C. § 1606.

D. Significantly, however, to the extent that foreign law applies, Section 1606 would also prevent a foreign state from invoking the foreign equivalent of sovereign immunity. *Cf. Feres v. United States,* 340 U.S. 135, 141 (1950) (nearly identical language in the FTCA indicates "not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence").[7]

* * * *

[30] CONCLUSION

For the above reasons, if the Court exercises pendent appellate jurisdiction over the merits issues addressed by the parties, the Court should hold that neither the FSIA nor the Flatow Act categorically preempts all state or local foreign causes of action against a foreign state, but that plaintiffs may not assert claims against a foreign state pursuant to the Flatow Act or the TVPA.

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[7] Plaintiffs here do not rely upon federal common law, which this Court rejected as a source of liability under the FSIA in *Bettis,* 315 F.3d at 333 (Section 1605(a) (7) "does not ... 'authorize the federal courts to fashion a complete body of federal [common] law'"). They also concede that the question of the availability of a claim under international law, which does not generally provide private rights of action, *see, e.g., United States v. Li,* 206 F.3d 56, 67 (1st Cir.) (en banc) ("treaties do not generally create rights that are privately enforceable in the federal courts"), *cert. denied,* 531 U.S. 956 (2000), is not ripe for review at this time, Pls. Br., 51. Thus, we do not address either as a potential source of causes of action under Section 1605(a) (7).

Respectfully submitted,

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PETITIONERS' SUPPLEMENTAL APPENDIX B

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

KENSINGTON INT'L LTD.,

v.

BRUNO JEAN-RICHARD ITOUA AND
SOCIÉTÉ NATIONALE DES PÉTROLES DU CONGO.

Nos. 06-1763, 06-2216.

May 23, 2007.

LETTER BRIEF[*]

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* * * *

[3]1. COMMON LAW, NOT THE FSIA, GOVERNS THE QUESTION WHETHER DEFENDANT ITOUA HAS IMMUNITY.

* * * *

[11] As to whether Itoua is ultimately entitled to claim common law immunity here, the Court should remand the case for the district court to decide that issue in the first instance, as it turns on potentially complex questions that have not been raised or

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[*] [Additional excerpts of this brief appear at pages 250a-257a of the Petition Appendix. Excerpts of three other U.S. briefs that contradict the Government's arguments in this case appear at pages 247a-249a and 258a-298a of the Petition Appendix.]

briefed by the parties and that are not addressed in the United States' Statement of Interest in *Dichter*. In particular, while common law immunity clearly extends to the official acts of traditional government ministers, such as the internal security minister sued in the *Dichter* case, it is not clear whether (and if so, to what extent) this immunity applies to corporate officers of a state owned commercial enterprise, such as Itoua. Moreover, even if common law immunity did extend to such individuals, there would still remain the question whether Itoua's allegedly corrupt conduct should be regarded as official or private in nature, *see* Dichter Statement at 24, a question that has received only cursory treatment here. *Compare* Pl. Br. 44 n.14, *with* Itoua Reply Br. 18 n.6. The government may wish to submit views on these and other relevant questions on remand.

* * * *

PETITIONERS' SUPPLEMENTAL APPENDIX C

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT.

Nos. 05-1815, 05-1816, 05-1821, 05-1822.

STANLEY BOIM, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID BOIM, AND JOYCE BOIM,

Plaintiffs/Appellees,

v.

HOLY AND FOUNDATION FOR RELIEF AND DEVELOPMENT MOHAMMAD ABDUL HAMID KHALIL SALAH, *et al.*,

Defendants/Appellants.

August 21, 2008.

On Appeal from the United States District Court for the Northern District of Illinois

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

* * * *

[5] ARGUMENT

As validly construed, Section 2333(a) provides liability under common law tort principles that include aiding/abetting and conspiracy liability in appropriate circumstances. This construction is supported by the text and history of Section 2333(a). It gains further support from Congress' determination that monetary assistance to a designated terrorist organization is forbidden regardless of whether the donor subjectively intends to help the organization's violent component.

[6] When the conditions for civil aiding/abetting and conspiracy liability are met, the imposition of liability raises no serious constitutional question. Neither the First Amendment nor any other part of the Constitution guarantees a right to provide money to a foreign terrorist organization.

A. SECTION 2333(A) PROVIDES A REMEDY TO U.S. VICTIMS OF INTERNATIONAL TERRORISM THAT INCORPORATES TORT PRINCIPLES OF SECONDARY LIABILITY.

Because "Congress has not enacted a general civil aiding and abetting statute," the question whether a particular civil cause of action encompasses aiding and abetting must be determined case-by-case. *See Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 182 (1994). As we next show, the text, history, and context of Section 2333(a) make clear that Congress intended to incorporate tort principles of secondary liability. In this respect, Section 2333(a)

differs from certain other federal statutes, discussed in more detail below, where those factors do not support the imposition of secondary liability.

1. The text of Section 2333(a) supports the imposition of secondary liability. The statutory language provides that "[a]ny national of the United States injured in his or her person [or] property ***by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor ***." 18 U.S.C. § 2333(a). Although Congress specifically barred suits under this provision against certain types [7] of defendants (the United States and foreign states, as well as their agencies, or officers or employees acting in an official capacity or under color of legal authority, *see* 18 U.S.C. § 2337), Congress did not address - and thus in no way restricted - the other types of defendants who can be held liable. Nor does the statutory text distinguish between primary and secondary tortfeasors.

Moreover, the wording of Section 2333 (a) closely resembles in key ways a civil damages provision in RICO (18 U.S.C. § 1964(c)). At the time that Section 2333(a) was passed in 1990 and 1992, this provision in RICO had been interpreted to include aiding/abetting liability. *See, e.g., Petro-Tech, Inc. Western Co.*, 824 F.2d 1349, 1356 (3d Cir. 1987). Congress' utilization of similar language in Section 2333(a) thus supports an inference that the remedy created by that provision encompasses secondary liability. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well").

As we next show, the conclusion that Congress intended for Section 2333(a) to encompass secondary liability is also strongly supported by the history and context of that provision.

[8] 2. Section 2333(a) was first enacted by Congress in 1990 (*see* Pub. L. No. 101-519,104 Stat. 2250), but was repealed in 1991. *See* S. Rep. No. 102-342, at 22 (1992); 137 Cong. Rec. 8143 (1991) (Sen. Grassley). It was reenacted in 1992, in identical form to its prior version. *See* Pub. L. No. 102-572, 106 Stat. 4506 (1992).

During hearings in 1990 on the provision that became Section 2333(a), former Justice Department official Joseph A. Morris explained that "American victims seeking compensation for physical, psychological, and economic injuries naturally turn to the common law of tort. American tort law in general would speak quite effectively to the facts and circumstances of most terrorist actions not involving acts of state by foreign governments." Antiterrorism Act of 1990, Hearing before the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990), at 83. At that time, a recognized body of civil tort law extended liability not only to defendants who actually committed a tort, but also to those who aided and abetted its commission. *See, e.g., Restatement (Second) of Torts*, §876(b) (1979) (describing tort liability for concerted action); *Damato v. Hermanson*, 153 F.3d 464, 472 n.10 (7th Cir. 1988) (applying civil tort aiding/abetting liability); *Halberstam v. Welch*, 705 F.2d 472, 477-88 (D.C. Cir. 1983) (same).

[9] At the 1990 hearing, Professor Wendy Perdue questioned whether the proposed cause of action was sufficiently broad, noting that a meaningful remedy for victims would have to extend not only to those

who commit terrorist acts, who are unlikely to have assets in the United States, but also to "the organizations, businesses and nations who support, encourage and supply terrorists[,] who are likely to have reachable assets." Hearing, at 126.

Senator Grassley raised this concern about secondary tort liability with Morris, who responded that the bill would "bring all of the substantive law of the American tort law system" into play. *Id.* at 136. Morris noted that in criminal law there is a doctrine of vicarious liability, and "[t]he tort law system has similar rules where liability attaches to those who knowingly or negligently make it possible for some actor grievously to injure somebody else. As Section 233 3(a) of this bill is drafted, it brings all of that tort law potential into any of these civil suits." *Ibid.*

Senator Grassley sponsored Section 2333(a), and explained that his bill "empowers victims with all the weapons available in civil litigation ***. The [Anti-terrorism Act] accords victims of terrorism the remedies of American tort law ***." 137 Cong. Rec. 8143 (1991).

The Senate Report on Section 2333(a) emphasized that, by imposing "liability at any point along the causal chain of terrorism, it would interrupt, or at least imperil, [10] the flow of money." S. Rep. No. 102-342, at 22 (1992) (emphasis added). This report also explained that the substance of actions under Section 2333(a) "is not defined by the statute, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts." *Id.* at 45.

Thus, the history of Section 2333(a) and the context of its enactment show that Congress was specifically concerned with enabling victims to sue not only those

who actually carry out terrorist attacks, but also those who make terrorist acts possible through, for example, donations of funds. Congress was assured that Section 2333(a) would address this concern by incorporating domestic tort law principles of secondary liability; this provision was designed from the outset to permit recovery against those who aid and abet international terrorists. Reading Section 2333(a) to include secondary liability effectuates Congress' goal of reaching those who support terrorist attacks through donation of funds.

* * * *

[15] B. SECTION 2333(A) PERMITS AIDING/ABETTING LIABILITY WHEN A DEFENDANT HAS PROVIDED KNOWING AND SUBSTANTIAL ASSISTANCE TO A TORTFEASOR, AND THE ACT OF INTERNATIONAL TERRORISM THAT INJURES THE VICTIM WAS REASONABLY FORESEEABLE BY THE DEFENDANT.

Because Section 2333(a) imposes civil liability and because Congress plainly intended to incorporate civil tort law principles, this Court should look to civil aiding/abetting and conspiracy jurisprudence to define the reach of secondary liability under the statute. That jurisprudence is summarized in the seminal D.C. Circuit [16] opinion in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), authored by Judge Wald, joined by then-Judge Scalia and Judge Bork, which the Supreme Court has described as "a comprehensive opinion on the subject." *Central Bank*, 511 U.S. at 181. *Accord In re Temporomandibular Joint (TMJ) Implants Products Liability Litigation*, 113 F.3d 1484, 1495-96 (8th Cir. 1997) (relying on *Halberstam* discussion of civil aiding/abetting

liability); *Fassett v. Delta Kappa Epsilon* (New York), 807 F.2d 1150, 1162-64 (3d Cir. 1986) (same).

* * * *

[22] 3. While Section 2333(a) is defined by civil tort principles, the subsequent enactments of 18 U.S.C. §§ 2339A and 2339B reinforce the conclusion that Section 2333(a) cannot properly be limited to those who personally commit acts of [23] international terrorism.[5] In addition, the anti-terrorism policies embodied in Section 2339B in particular reflect a complementary legislative scheme that should influence cases involving claims arising out of the provision of funds to entities designated as terrorist organizations by the United States. Thus, in order to carry out the important Congressional purpose of deterring terrorism—reflected in both the civil provisions in Section 2333(a) and the criminal provisions in Section 2339B—tort liability under the former can in some circumstances validly be imposed on defendants who provide substantial assistance to terrorist organizations such as Hamas through donations of money, knowing that these groups have been so designated or that they engage in terrorism as part of their broader activities.

Section 2339A makes it unlawful to provide "material support or resources *** knowing or intending that they are to be used" in preparing or carrying out certain specified terrorism-related crimes. Section 2339B makes it unlawful to "knowingly provid[e] material support or resources," to an entity designated by the United States as a "foreign terrorist organization." Guilt under Section 2339B does not depend on any showing of specific

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[5] Section 2339A was enacted in 1994, shortly after Section 2339(a), while Section 2339B was enacted in 1996.

intent by a defendant to further the illegal activities of the terrorist organization. *See* [24] *Humanitarian Law Project v. Mukasey,* 509 F.3d 1122, 1132 (9th Cir. 2007); *United States v. Taleb-Jedi,* F. Supp. 2d, 2008 WL 2832183, at *14-*18 (E.D.N.Y. July 23, 2008); *United States v. Assi,* 414 F. Supp. 2d 707, 719-24 (E.D. Mich. 2006); *United States v. Marzook,* 383 F. Supp. 2d 1056, 1068-71 (N.D. Ill. 2005).

In enacting Section 2339B, Congress determined that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act"), Pub. L. No. 104-132 § 301(a)(7), 18 U.S.C. 2339B note (emphasis added). Because of "the fungibility of financial resources and other types of material support," any such support "helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities." H.R. Rep. No. 104-383, at 81 (1995).

Given its fungibility, material support can further an organization's terrorist activities whether or not the donor intends that result. "Once the support is given, the donor has no control over how it is used." *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1134 (9th Cir. 2000).

[25] Further, even if monetary support were not fungible and even if a donor could somehow ensure that his donation would be used only for legal purposes, that support could still further terrorist activities by allowing terrorist entities to gain goodwill that can be used for terrorist recruitment or other assistance, or to gain political legitimacy for those who carry out deadly terrorist acts. *See Taleb-*

Jedi, 2008 WL 2832183, at *7 ("[T]hese organizations use their humanitarian pursuits to garner support for their terrorist activity. ***[C]onduct that is overtly non-terrorist, or even eleemosynary, can serve violent ends when performed on behalf of a terrorist organization").

Accordingly, Congress banned a broad array of types of material support because the risk is too great that it would wind up furthering the terrorist group's violent activities, regardless of the donor's intent. *See Assi*, 414 F. Supp. 2d at 722 ("Congress, concerned that terrorist organizations would raise funds 'under the cloak of humanitarian or charitable exercise,' sought to pass legislation that would 'severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States.'") (quoting H.R. Rep. No. 104-383, at *43 (1995), and *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005), *aff'd*, 509 F.3d 1122 (9th Cir. 2007)).

Congress in Section 2339B imposed criminal liability not only on those who personally commit acts of terrorism, but also on those who assist such acts by [26] providing material support to terrorists or terrorist organizations. It did so because such support to a foreign terrorist organization undermines the anti-terrorism policies of the United States even if the donor does not have any specific intent to further the violent activities of such an organization. The support alone, regardless of the intent of the donor, is the underpinning of criminal liability for material support because terrorist organizations such as Hamas do not actually have dual and independent capacities. Rather, the two components are inseparable parts of the same organization that has

an overall goal that is to be achieved in part through terrorism.

4. Taking *Halberstam*'s reasoning and the Congressional intent behind Section 2333(a) and Section 2339B into account, we believe that the answer to this Court's specific question in its June 16 order is that a donor to a terrorist organization can be civilly liable for a terrorist act on an aiding/abetting theory even if the donor does not intend to advance the violent component of the recipient organization's activities. Nevertheless, in order to recover under an aiding/abetting claim, a plaintiff under Section 2333(a) must show that the defendant knowingly provided substantial assistance to a terrorist organization. Whether the assistance provided qualifies as substantial will depend on an analysis of the relevant conduct by reference to the six *Restatement and Halberstam* factors. The plaintiff must then also show that the act [27] of international terrorism that actually injured the victim was reasonably foreseeable by the defendant.

We do not believe that it is sufficient for liability under Section 2333(a) to show simply that a defendant provided funds to a terrorist group, and that group later committed an act of international terrorism injuring a U.S. national. However, the provision of funds could be a basis for liability if the donor knew that the group had been designated as a terrorist organization or was aware of the group's terrorist activity, and if the provision of funds was sufficiently substantial and the ultimate terrorist act was reasonably foreseeable. In the case at bar, the required analysis is more complex because it involves support provided by the defendants to Hamas in part before that entity had been designated by the United States as a terrorist organization, although the

murder of David Boim occurred after donations of money to Hamas by U.S. persons were already illegal under Executive Order 12,947. Accordingly, in this specific case, application of Section 2333(a) may be most properly carried out by reference simply to the standard secondary tort liability principles described in Halberstam without reference to the policy embodied in Section 2339B.

* * * *

Supreme Court, U.S.
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117 (8) No. 08-640

IN THE
Supreme Court of the United States

IN RE TERRORIST ATTACKS ON SEPTEMBER 11, 2001

FEDERAL INSURANCE COMPANY *et al.*,
Petitioners,

v.

KINGDOM OF SAUDI ARABIA *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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INTRODUCTION

Respondents address the bulk of their four briefs to the sufficiency of petitioners' complaints, the potential outcome of this case in lower courts if this Court were to rule in favor of petitioners, and, quite defensively, the Saudis' role in the war on terror. What they barely address are the reasoning, scope, and implications of the Second Circuit's decision. That decision acknowledges a circuit split on an important issue of FSIA immunity—recently deepened by a Fourth Circuit decision in conflict with the Second Circuit and important enough that the United States has repeatedly opposed the construction the Second Circuit adopted.[1] The decision below also sharply limits the normal operation of state tort law, heretofore preserved by FSIA § 1605(a)(5), when terrorists strike in the United States—in conflict with decisions of the Ninth Circuit and other courts. And, in contrast to other courts of appeals, the Second Circuit has placed a constitutional limit on federal court jurisdiction over claims against donors to terrorist organizations, and has uniquely required a showing that donors directed terrorist attacks against U.S. citizens or specifically intended funds to be used for such attacks.

ARGUMENT

A. FSIA "State" Immunity

1. In *Yousuf* v. *Samantar*, --- F.3d ---, 2009 WL 40942 (4th Cir. Jan. 8, 2009), the Fourth Circuit

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[1] Pet. 17-20. The U.S. stated recently that it "disagrees with the position adopted in [this case by the Second Circuit] that the FSIA applies to foreign officials." Reply to 28(j) Letter at 2, *Matar* v. *Dichter*, No. 07-2579-cv (2d Cir., filed Oct. 29, 2008).

confirmed and further deepened the split among the circuits over FSIA's application to foreign officials. It canvassed the circuit split and then followed the Seventh Circuit's "especially persuasive" interpretation of FSIA in *Enaharo* v. *Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). *Yousef*, 2009 WL 40942, at *6-8. The Fourth Circuit considered and rejected the reasoning of the Second Circuit in this case and the Ninth Circuit in *Chuidian* v. *Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), concluding instead "that the FSIA does not apply to individual foreign government agents." 2009 WL 40942, at *7-9.

The Fourth Circuit's decision confirms the mistake in respondents' half-hearted suggestion that it is "far from clear" that the Second Circuit's decision is in "genuine conflict" with the Seventh Circuit. Turki Br. 16-17; Sultan Br. 14-16. The Second Circuit *acknowledged* its conflict with the Seventh Circuit. Pet. App. 15a. The Seventh Circuit has likewise acknowledged that its approach conflicts with *Chuidian*, *Enaharo*, 408 F.3d at 882, as has the United States, Pet. App. 293a-294a; *supra* n.1. And all for good reason: *Enaharo* addressed immunity for "official conduct" undertaken as "a public official," and rejected the construction of FSIA that the Second Circuit adopts. *Enaharo*, 408 F.3d at 880-81. Even if *Enaharo* were not enough, *Ye* v. *Zemin*, 383 F.3d 620, 625 (7th Cir. 2004), employed like reasoning to conclude that FSIA does not apply to individuals, there a head of state.

The Fourth Circuit's decision also underscores the error in respondents' claim that the conflict regarding 28 U.S.C. § 1603 is somehow blunted by Congress' recent passage of 28 U.S.C. § 1605A. Turki Br. 18-19; Sultan Br. 15-16. That latter provision does not purport to amend FSIA's definition of "state" or

modify § 1603 in any manner. Instead, the provisions respondents address simply provide, in § 1605A(a)(1), that acts of certain "officials" may be attributed to the state (as FSIA always has provided, see 28 U.S.C. § 1605(a)(5)) and, in § 1605A(c), that victims of state sponsored terrorism may pursue a new federal cause of action and recover a broad range of damages (reversing an earlier, contrary decision). If § 1605A has any relevance for construing § 1603, it supports the Seventh and Fourth Circuits' approach by sharply distinguishing between "states" and "officials," which would be superfluous if the Second Circuit's construction were correct. See *id.* § 1605A(c) ("a foreign state shall be vicariously liable for the actions of its officials").

2. Respondents mistakenly contend that common law immunity somehow undermines the importance of the question presented or makes § 1603 irrelevant to the ultimate disposition of this case.

Respondents' claim that the question lacks importance assumes that the Second Circuit's decision had no effect on common law immunity for officials, Turki Br. 19-20; Sultan Br. 17, but that is clearly wrong. While the Second Circuit did not "need [to] consider" common law immunity in light of its FSIA holding, Pet. App. 18a, it expressly addressed the open issue of "'whether the FSIA was meant to supplant the "common law,"'" and acknowledged that the *Chuidian* analysis it adopted displaced common law immunity. *Id.* at 13a, 18a-19a (quoting *Tachiona* v. *United States*, 386 F.3d 205, 220 (2d Cir. 2004)). Respondents' view that the common law survives the Second Circuit's decision as an alternative basis for immunity is inconsistent with Congress' careful crafting of exceptions to immunity in § 1605(a)-(g) and established law that interprets

FSIA as uniformly regulating "state" immunity. See, *e.g.*, *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488-49 (1983). The United States' arguments addressing the "*Chuidian*[ ] approach['s] troubling practical consequences" and "problematic implications" rest on the understanding that that approach displaces common law immunity. Pet. App. 295a, 255a; see Pet. 17-20.[2]

Nor would rejecting the Second Circuit's reasoning, and acknowledging the relevance of common law immunity, be immaterial to the outcome of this case. Respondents would have this Court assume that they are protected by common law immunity. See Turki Br. 21-22, 25-26; Sultan Br. 20-21, 23-24. No court below has addressed this issue. Common law immunity likely does not apply, based on the claims of terrorism at issue and the role that certain respondents played in directing non-traditional agents (*i.e.*, extraterritorial "charities") as part of their official service. Nor has the U.S. determined whether immunity should exist in this case or whether it wishes to shield officials from liability related to the September 11th attacks. In any event, these issues would be addressed in proceedings following this Court's decision, and prejudging them provides no basis for declining to address important issues that divide the courts of appeals.

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[2] Because respondents understate the implications of the Second Circuit's decision for the continued applicability of common law immunity (and ignore *Chuidian* on this point), they sidestep the considerable tension that exists between the approach of the Second and Ninth Circuits to senior officials' immunity and the approach of the Seventh and Eleventh Circuits. See Pet. 19-20; Pet. App. 294a (U.S. view that the *Chuidian* approach is "precisely backwards" and inconsistent with other decisions).

B. FSIA's Noncommercial Tort Exception.

Respondents' arguments concerning the noncommercial tort exception assume that §§ 1605(a)(5) and 1605A cannot both address terrorism-related harm: that construing § 1605(a)(5) to support terrorism-related claims would permit plaintiffs to "plead around" the limitations of § 1605A, rendering that provision a "dead letter" and eliminating any "'need for plaintiffs ever to rely on [§ 1605A] when filing suit.'" Kingdom Br. 19, 22; Sultan Br. 25. This ignores two fundamental aspects of FSIA. First, Congress initially limited § 1605(a)(5) to torts causing injury in the United States and then, in response to a series of extraterritorial terrorist attacks, *extended* FSIA liability against state sponsors of terrorism for harm caused to U.S. interests anywhere in the world. See Pet. 23-24. Congress preserved the scope of § 1605(a)(5) and contemplated that §§ 1605(a)(5) and 1605A might overlap to some degree when it indicated that § 1605A applies only "in any case not otherwise covered by this chapter." 28 U.S.C. § 1605A(a). By extending relief for terrorism victims abroad, Congress clearly did not limit relief for acts of terrorism undertaken *in the United States.*

Against this backdrop, a conflict clearly exists between the Second and Ninth Circuits. The Ninth Circuit held that § 1605(a)(5) supports claims by victims of state-sponsored extrajudicial killings undertaken in the United States. See *Liu* v. *Republic of China*, 892 F.2d 1419, 1424-25 (9th Cir. 1989); see also *Letelier* v. *Republic of Chile*, 488 F. Supp. 665, 672-73 (D.D.C. 1980); 28 U.S.C. § 1605A(a)(1) ("extrajudicial killing" is an act of terrorism). The Second Circuit acknowledged that § 1605(a)(5) is written in broad terms and that acts of terrorism are "[b]y definition" torts, Pet. App. 27a, 31a, but held

that § 1605(a)(5) precludes recovery for acts also encompassed by § 1605A. Pet. 22-23. *Letelier* and *Liu* were decided before Congress *extended* relief available to terrorism victims, see *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88, 90 (D.C. Cir. 2002), but § 1605A provides no basis to believe that the Ninth Circuit would abandon its construction of § 1605(a)(5) or that *Liu* would be decided differently today. See *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 15 (D.D.C. 1998) (continued vitality of *Liu* and *Letelier*); *Doe* v. *bin Laden*, 580 F. Supp. 2d 93, 97 (D.D.C. 2008).

Respondents' arguments also remove any doubt that the question presented for review is significant. Respondents confirm that the Second Circuit's decision must be read to provide what Congress could not possibly have intended §§ 1605(a)(7) and 1605A to accomplish: to bar terrorism victims from recovering for tortious acts of terrorism committed in the United States except in the most limited circumstances and to scale back sharply the normal operation of states' tort law to redress that harm, a power preserved by § 1605(a)(5). See Kingdom Br. 14-15, 20-21; Sultan Br. 25. Under the Second Circuit's reading, § 1605A transfers states' police power to the State Department, which through designations of state sponsors of terrorism would determine which tortfeasors could be subject to suit. See Kingdom Br. 14. This unwarranted constriction of states' ability to redress harm caused by acts of terrorism undertaken on their soil alone justifies this Court's review.

Respondents also argue that this case is a poor vehicle to address the question presented because the complaint alleges extraterritorial acts beyond the scope of § 1605(a)(5), which addresses injuries in the

U.S. and has been construed by some lower courts as requiring that the underlying tort be committed in the U.S. See Kingdom Br. 19-20. This conclusion was not, of course, the basis for the Second Circuit's decision. And, even if the likelihood of plaintiffs' eventual success were relevant now, plaintiffs are likely to prevail.

This case is quite unlike, for example, *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984), where plaintiffs alleged emotional injury incurred in the U.S. based on a tort committed in Iran, or *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), where officials in Mexico failed to compensate certain U.S. landholders. Here, the 19 hijackers who boarded planes in Boston, New Jersey and Washington, D.C. and then crashed those planes in New York, Virginia, and Pennsylvania clearly committed a tort within the United States, and § 1605(a)(5) readily encompasses conspiracy and aiding and abetting claims that attribute liability for that tort to persons who may act abroad. See *Doe*, 580 F. Supp. 2d at 98-99 (and cases cited); *Olsen* v. *Gov't of Mexico*, 729 F.2d 641, 646 (9th Cir. 1984), *abrogated on other grounds*, *Joseph* v. *Office of Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987).[3]

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[3] Respondents also claim that this case is a poor vehicle because petitioners would not ultimately satisfy the "discretionary function" exception to § 1605(a)(5). This issue, too, was not the basis for the Second Circuit's decision. It is also startling that respondents would embrace a theory that posits that facilitating the September 11th attacks was a conscious policy of the Saudi government and of a type that Congress intended to immunize.

C. Personal Jurisdiction.

Respondents seek to sidestep the Second Circuit's obvious misapplication of this Court's personal jurisdiction decisions, and the conflict among the courts of appeals, by understating the scope and rationale of the decision below. Respondents repeatedly claim that the alleged tie between them and the United States was simply that they "made personal donations to foreign charities that in turn made payments to al Qaeda," Turki Br. 27, 29, or that they made "donations to charitable organizations, knowing that the charities would divert funds to al Qaeda." Sultan Br. 29.[4] In fact, the Second Circuit held that no personal jurisdiction existed even assuming that respondents "kn[ew] that their money would be diverted to al Qaeda," were "aware of Osama bin Laden's public announcements of jihad against the United States and al Qaeda's attacks on the African embassies and the U.S.S. Cole," and "could and did foresee that recipients of their

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[4] Respondents generally mischaracterize the record in significant respects that will be addressed should the petition be granted. They also inaccurately contend that the complaints' allegations are insufficient, while ignoring the Second Circuit's determination that the complaints include "a wealth of detail." Pet. App. 5a. In any event, the sufficiency of the allegations was not a basis for and is irrelevant to the Second Circuit's decision.

Prince Mohamed similarly errs in claiming that petitioners' personal jurisdiction arguments do not apply to him. He is the chairman of and a principal investor in a banking conglomerate that facilitated funding for al Qaeda, and he knowingly and materially supported those actions. *See* Burnett Pls.' Third Amended Compl. ¶¶ 97-102, 364-366; WTC Props. Pls.' Compl. ¶¶ 700-702; Pet. App. 44a-45a. Petitioners challenge the Second Circuit's conclusion that personal jurisdiction was lacking over *all* the princes because they did not "direct[ ]" or "command[ ]" the September 11th attacks. Pet. App. 41a-45a.

donations would attack targets in the United States." Pet. App. 43a-44a. What was lacking, according to the Second Circuit, was an allegation that respondents "directed the September 11 attacks or commanded an agent (or authorized al Qaeda) to commit them." *Id.* at 42a.

Against this backdrop, it is a perverse application of this Court's decisions to conclude that respondents should not "reasonably anticipate being haled into court" in the United States, *World Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980), or that they did not "'purposefully direct[ ]' [their] activities at residents of the [United States]." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472-73 (1985). In light of the Second Circuit's assumptions, the split between the courts of appeals is apparent. The Second Circuit construed *Calder* v. *Jones*, 465 U.S. 783 (1984), to require that respondents "'expressly aimed' intentional tortious acts at residents of the United States." Pet. App. 44a. By contrast, the Seventh, Ninth, and D.C. Circuits have found that requirement met where, as here, defendants undertook action that they reasonably knew would harm citizens of the judicial forum. See Pet. 28-30 (citing cases).

Boim v. *Holy Land Foundation*, 549 F.3d 685 (7th Cir. 2008) (en banc), underscores the circuit split between the Seventh and Second Circuits and the threat that the Second Circuit's decision poses to the enforcement of U.S. counterterrorism law. While the *en banc* court had no occasion to address the Due Process Clause directly, it defined what intentional conduct suffices for establishing when a defendant's wrongful donations to terrorist groups are directed at U.S. citizens—the linchpin of the Second Circuit's due process analysis.

Boim involved a suit against donors to Hamas under 18 U.S.C. § 2333, which allows damages for harm caused by acts of international terrorism and was one of petitioners' claims dismissed by the Second Circuit. Donors to Hamas were liable for the death of a U.S.-Israeli citizen living in Israel because "[the victim] was a natural target for Hamas," and because donating to Hamas amounted to "intentional misconduct" directed at its victims when the donor "either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not." *Boim*, 549 F.3d at 691, 693. "Giving money to Hamas, like giving a loaded gun to a child"—even without "desire [that] the child ... shoot anyone"—satisfies the intentionality requirement not only for criminal statutes such as 18 U.S.C. § 2339A, but also for the tort standards associated with § 2333. *Id.* at 690, 693.

Boim thus confirms that, in the Seventh Circuit, donation to a terrorist organization known to target U.S. citizens amounts to the intentional direction of harm against them; the Second Circuit's holding in this case is precisely to the contrary. *Boim* removes any doubt that the Seventh Circuit would apply *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200 (7th Cir. 1997), to uphold petitioners' claims, and particularly their § 2333 claim, in direct conflict with the Second Circuit's dismissal of the claims. *Boim* also confirms that the civil and criminal counterterrorism statutes, including §§ 2333 and 2339A-C, extend to overseas contributions to organizations that commit acts of terrorism in a broad range of circumstances that the Second Circuit has now held are beyond the jurisdiction of U.S. courts.

Respondents have no substantive response to the Second Circuit decision's effect on U.S. counter-

terrorism laws other than to dismiss the concern as speculative. Turki Br. 32-33; Sultan Br. 31-32; Mohamed Br. 14-15. *Boim* shows this to be false. And each day, relying on far less direct ties between supporters of terrorism and the United States than the Second Circuit required, the U.S. Government enforces financial restrictions and the criminal and civil laws directed against provision of material support to terrorists, see Pet. 31-32, without establishing that targets of those enforcement actions "directed ... attacks or commanded an agent ... to commit them," as the Second Circuit required. Pet. App. 42a. Already, terrorists and their supporters are challenging these enforcement efforts on due process grounds. See *United States* v. *Al Kassar*, 582 F. Supp. 2d 488 (S.D.N.Y. 2008). The Second Circuit's decision will buttress their claims, which is reason enough for this Court's review.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

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No. 08-640

In the Supreme Court of the United States

FEDERAL INSURANCE CO., ET AL., PETITIONERS

v.

KINGDOM OF SAUDI ARABIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the immunity from suit of foreign governmental officials for acts within their official capacity is governed by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, or by principles of immunity recognized by the Executive Branch in the exercise of its authority over foreign affairs.

2. Whether tort claims may be asserted against a foreign state under the FSIA's tort exception, 28 U.S.C. 1605(a)(5), where the foreign state's asserted liability is based on donations to charitable institutions outside the United States that were allegedly diverted to a terrorist group that committed acts of terrorism within the United States.

3. Whether courts in the United States may, consistent with the Due Process Clause, exercise personal jurisdiction over civil claims against foreign nationals on the ground that those individuals made donations abroad to charitable institutions that foreseeably diverted some of those funds to a group that intended to commit terrorist attacks against the United States.

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In the Supreme Court of the United States

No. 08-640

FEDERAL INSURANCE CO., ET AL., PETITIONERS

v.

KINGDOM OF SAUDI ARABIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states and their agencies and instrumentalities are immune unless a claim falls within one of the specified exceptions to that immu-

nity. 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions arising out of a foreign state's commercial activities, 28 U.S.C. 1605(a)(2), certain tort actions, 28 U.S.C. 1605(a)(5), and certain actions arising out of terrorist activities by designated state sponsors of terrorism, 28 U.S.C. 1605A(a)(1).[1]

B. This multi-district litigation encompasses numerous cases brought by persons injured in the September 11, 2001 terrorist attacks against the United States. Pet. App. 1a, 117a. The complaints allege in relevant part that the Kingdom of Saudi Arabia, the Saudi High Commission for Relief to Bosnia and Herzegovina (SHC), and four Saudi Princes, acting both in their capacities as high-level government officials and also in their personal capacities, made donations to ostensibly charitable organizations with knowledge that those charities were diverting funds to al Qaeda. *Id.* at 2a, 5a-8a. They also allege that a fifth Prince knowingly provided material support, including banking and financial services, to Osama bin Laden and al Qaeda. *Id.* at 8a.

The district court dismissed the claims against Saudi Arabia, SHC, and the Princes. Pet. App. 56a-82a, 144a-194a. The court held that the FSIA afforded immunity to Saudi Arabia and SHC as well as to the Princes for their official acts and that none of the FSIA's exceptions applied. *Id.* at 72a-75a, 135a-168a. The court also held

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[1] The terrorism exception was enacted in 1996. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221(a)(1), 110 Stat. 1241 (28 U.S.C. 1605(a)(7) (Supp. II 1996)). In 2008, Congress repealed that provision and enacted an amended terrorism exception. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a), 122 Stat. 338 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)). All references to the NDAA here are to Supplement II (2008) of the United States Code.

that it lacked personal jurisdiction over the Princes for their personal actions. *Id.* at 80a-82a, 185a-194a.

C. The court of appeals affirmed. Pet. App. 1a-47a. The court held that the FSIA "protects an individual official of a foreign government acting in his official capacity" as well as the state itself. *Id.* at 13a. Petitioners' claims could not, the court held, proceed under the FSIA's domestic tort exception, 28 U.S.C. 1605(a)(5), because Congress specifically addressed terrorism-related claims in a separate exception expressly limited to states designated by the Secretary of State as sponsors of terrorism, 28 U.S.C. 1605A(a)(1). If the tort exception were applied to acts of terrorism, "[a]n important procedural safeguard [of the terrorism exception] —that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a. The court of appeals also affirmed the dismissal for lack of personal jurisdiction of the claims against the Saudi Princes for their private acts. Pet. App. 39a-47a.

DISCUSSION

Petitioners ask the courts of the United States to hold Saudi Arabia and several of its high-ranking officials responsible for the September 11 terrorist attacks, asserting jurisdiction on the basis of foreign actions by or on behalf of the Kingdom concerning funding for ostensible charities. Petitioners link the defendants to the September 11 attacks by alleging that respondents knew their charitable donations would be used to provide financial support to al Qaeda. The lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States. Although the United States disagrees in certain respects with the analysis of the court of appeals, fur-

ther review by this Court to determine the best legal basis for that immunity is unwarranted. Nor is review warranted as to whether petitioners' allegations concerning the Princes' support of al Qaeda permit the exercise of personal jurisdiction over those defendants.

A. The Saudi Princes Are Immune From Suit For Their Official Acts That Form The Basis Of Petitioners' Suit

1. The United States has long recognized the principle that foreign sovereigns are generally immune from suit in our courts. *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812). Wrongs perpetrated by foreign sovereigns generally have been recognized as appropriate "for diplomatic, rather than legal," resolution. *Id.* at 146. In addition, the Court has upheld "[t]he immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). In fact, "the immunity which all civilized nations allow to foreign ministers" when representing their sovereigns was an established practice from which the Court extrapolated broader principles of state sovereign immunity in *The Schooner Exchange*, 11 U.S. (7 Cranch) at 138.

In light of the potentially significant foreign relations consequences of subjecting another sovereign state to suit, the Court historically looked to "the political branch of the government charged with the conduct of foreign affairs" for an indication whether immunity should be recognized. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945). The Executive similarly provided the judiciary with suggestions of immunity for foreign *officials* sued for their governmental acts, based on the Executive's judgments regarding customary interna-

tional law and reciprocal practice. *E.g.*, *Greenspan* v. *Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Waltier* v. *Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960). Where the Executive made no specific recommendation about immunity in a case, the courts decided the question "in conformity to the principles" the Executive had previously articulated. *Republic of Mexico*, 324 U.S. at 35 (state immunity); *Heaney* v. *Government of Spain*, 445 F.2d 501, 504-506 (2d Cir. 1971) (official immunity).

For much of the Nation's history, the Executive followed a theory of absolute foreign sovereign immunity, "under which 'a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.'" *Permanent Mission of India to the U.N.* v. *City of New York*, 127 S. Ct. 2352, 2356 (2007) (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976)). In 1952, however, the State Department adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states would be granted immunity only for their sovereign or public acts, and not for their commercial acts. See *Alfred Dunhill*, 425 U.S. at 698. Significantly, even after endorsing the restrictive theory of immunity for foreign *states*, the Executive continued to recognize the immunity of foreign *officials* for their official acts in circumstances in which the state would not itself be immune. See *Greenspan*, 1976 WL 841, at *2.[2]

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[2] The immunity of federal officials for official acts similarly extends beyond the immunity of the federal government. 28 U.S.C. 2679(b)(1).

In 1976, Congress enacted the FSIA, which, "[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). By its terms, the FSIA governs the immunity of a "foreign state," which is defined to include an "agency or instrumentality" of the state. 28 U.S.C. 1603(a). The statute makes no reference to the immunity of foreign officials. The Executive recently has reiterated that it "generally recognizes foreign officials to enjoy immunity from civil suit with respect to their official acts—even including, at least in some situations, where the state itself may lack immunity under the FSIA." U.S. Amicus Br. at 21, *Matar* v. *Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579).

2. The court of appeals held that the Princes are immune under the FSIA for their official acts, reasoning that "an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the" statutory immunity. Pet. App. 14a (quoting 28 U.S.C. 1603(a)). The United States agrees with the court's conclusion that the Princes are immune from petitioners' claims. But in the view of the United States, that immunity is properly founded on non-statutory principles articulated by the Executive, not the FSIA. That difference of opinion on the correct legal basis for the individual defendants' official immunity does not, however, warrant this Court's review.

a. The text, structure, and history of the FSIA demonstrate that it was not intended to address the immunity of foreign officials. Section 1603(a) provides that the phrase "foreign state" includes an "agency or instrumentality." 28 U.S.C. 1603(a). Congress's use of the

terms "agency" and "instrumentality" rather than "agent" suggests they were not intended to encompass natural persons. That conclusion is reinforced by Subsection (b)'s definition of "agency or instrumentality" as an "entity" that "is a separate legal person, corporate or otherwise," which indicates an exclusive concern with non-natural "entit[ies]." 28 U.S.C. 1603(b).

Other features of the FSIA confirm that understanding. For example, the statute makes "the property of an agency or instrumentality of" a designated terrorist state subject to execution to satisfy a terrorism-related judgment against the state itself. See 28 U.S.C. 1610(g)(1). It is difficult to believe that Congress intended, as would follow from the court of appeals' ruling, that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related judgment against the state. Similarly, the FSIA's focus on the status of an entity as an agency or instrumentality at the time suit was filed, see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003), would mean, if applied in the same fashion to the immunity of officials, that a plaintiff could circumvent that immunity by waiting until an official left office. Congress is unlikely to have conferred a time-limited immunity of this nature.

The FSIA's legislative history further demonstrates that Congress did not intend to supplant existing principles regarding the immunity of foreign officials. In clarifying that the FSIA would not affect diplomatic or consular immunity, notwithstanding the tort exception's reference to torts committed by foreign officials acting within the scope of their authority, the House report explained that the statute would "deal[] only with the immunity of foreign states." H.R. Rep. No. 1487, 94th

Cong., 2d Sess. 21 (1976) (*House Report*). Further, the report noted that with regard to discovery, "official immunity," of a kind existing separate from and outside of the FSIA, would apply if a litigant sought to depose a "high-ranking official of a foreign government." *Id.* at 23.

b. As petitioners note (Pet. 15-16), the courts of appeals disagree over whether the FSIA governs the immunity of foreign officials. Compare Pet. App. 19a (applying FSIA), *Belhas* v. *Ya'alon*, 515 F.3d 1279, 1284-1288 (D.C. Cir. 2008), *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), *Byrd* v. *Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380 (5th Cir. 1999), and *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990), with *Yousef* v. *Samantar*, 552 F.3d 371, 381 (4th Cir. 2009) (holding FSIA inapplicable, remanding for consideration of other sources of immunity), and *Enahoro* v. *Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). But that disagreement appears to be of little practical consequence, and is of no consequence where, as here, respondents would be immune from suit under both the FSIA and principles articulated by the Executive.

Notably, the Ninth Circuit, the first of the courts of appeals to adopt the FSIA as the framework for analyzing foreign official immunity, did so in order to *protect* foreign officials from suit and to prevent the FSIA from "be[ing] vitiated if litigants could avoid immunity simply by recasting the form of their pleadings" to name individual foreign officials as defendants. *Chuidian*, 912 F.2d at 1102. Where, as in *Chuidian* and this case, the lower courts apply the FSIA to provide immunity and the Executive also would recognize such immunity, the different approaches produce the same result, and the

divergence in rationales becomes irrelevant. Indeed, in a case subsequent to this one, the Second Circuit held that the two sources of immunity are complementary, rather than mutually exclusive. See *Matar*, 563 F.3d at 13 (holding that "whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law"). The *Matar* holding suggests that a defendant never could be subject to suit under the FSIA where the principles of immunity recognized by the Executive afford a broader immunity, thus eliminating the possibility of this kind of conflict.[3]

Questions have emerged in two contexts in which the FSIA might provide a less expansive immunity than the principles recognized by the Executive, but whether there is any genuine divergence is still unclear. First, as noted above, application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office. See *Yousef*, 552 F.3d at 383 (holding that FSIA does not protect former officials, but remanding for consideration of non-FSIA immunity). But that potential anomaly so far has not led to untoward results. In *Matar*, the Second Circuit found it unnecessary to decide how *Dole Food* would apply to official immunity under the FSIA because, as noted above, "whether the FSIA applies to former officials or not, they continue to enjoy immunity under common law." 563 F.3d at 13. And in *Belhas*, the D.C. Circuit concluded that the temporal rule of *Dole Food* does not apply to foreign officials in light of differences between a foreign state's relationship to its officials and the state's relationship to corporate entities, as

[3] Although the Executive retains the authority to decline to recognize immunity in a case in which the FSIA would provide immunity, that issue is not presented in this case.

in *Dole Food*. 515 F.3d at 1286. That holding again eliminated any practical difference between the FSIA and Executive principles as the source of official immunity.

A second situation of possible divergence has arisen when foreign officials are sued individually for official acts falling within the FSIA's commercial activities exception. Two appellate decisions have upheld jurisdiction over foreign government officials in this circumstance, raising the possibility that the FSIA approach to official immunity would have a narrower scope than that based on principles recognized by the Executive Branch. See *Byrd*, 182 F.3d at 382, 384-385, 389-391 (alleged conspiracy by state-owned corporation to take control of sawmill); *Keller*, 277 F.3d at 816-817 (alleged conspiracy of officials at state bank to defraud plaintiff). But, in fact, principles recognized by the Executive also might have allowed those two suits to go forward. In neither case did the Executive recommend immunity, nor did the courts consider non-statutory immunity. Recently, moreover, the Executive has indicated that "it is not clear whether (and if so, to what extent) [non-statutory] immunity applies to corporate officers of a state owned commercial enterprise." U.S. Ltr. Br. at 10, *Kensington Int'l Ltd.* v. *Itoua*, 505 F.3d 147 (2d Cir. 2007) (No. 06-1763). That issue is not, in any event, presented here, where the challenged activity is not commercial in nature. See Pet. App. 39a.

Because the judgment of the court of appeals upholding the individual officials' immunity was correct, further review by this Court regarding the precise basis of that immunity—a question that may be of limited practical significance—is unwarranted.

B. The Court Of Appeals Correctly Held That Petitioners' Claims Do Not Satisfy The Domestic Tort Exception

1. When Congress adopted the FSIA in 1976, it included an exception to immunity for certain noncommercial claims involving injuries "occurring in the United States and caused by the tortious act or omission of [the] foreign state." 28 U.S.C. 1605(a)(5). The tort exception is limited in several significant respects. It retains immunity with respect to "discretionary function[s]" as well as particular torts likely to concern public activity, such as "malicious prosecution." 28 U.S.C. 1605(a)(5)(A) and (B). In addition, although the text "is susceptible of the interpretation that only the effect of the tortious action need occur" in the United States, *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1524 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985), this Court has clarified that the tort exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441.

In 1996 and again in 2008, Congress adopted a further exception to immunity expressly addressed to terrorism-related claims. 28 U.S.C. 1605A. In contrast to the domestic tort exception, the terrorism exception has no territorial limitation; it was specifically intended to permit United States victims to sue for injuries sustained from certain acts of terrorism abroad. See, *e.g.*, 28 U.S.C. 1605A(a)(2)(A)(iii) (addressing "a case in which the act occurred in the foreign state against which the claim has been brought"). The terrorism exception permits claims based on "torture, extrajudicial killing, aircraft sabotage, [and] hostage taking." 28 U.S.C. 1605A(a)(1). The exception also applies where the for-

eign state provided "material support or resources for such an act" of terrorism. *Ibid.* The material-support provision has been construed to permit the exercise of jurisdiction in United States courts "based on a state's general 'material support' for a terrorist organization," as long as that support was a "proximate cause" of the plaintiff's injury. *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004). The terrorism exception contains, however, a critical political check. Such claims can only be brought against a country that has been "designated as a state sponsor of terrorism" by the Secretary of State. 28 U.S.C. 1605A(a)(2)(A)(i)(I). Saudi Arabia has never been so designated.

2. The court of appeals held that "claims based on terrorism must be brought under the Terrorism Exception, and not under any other FSIA exception." Pet. App. 33a. In fact, contrary to the court's analysis, the tort and terrorism exceptions are not mutually exclusive. But the court was correct that the tort exception's territorial limitation cannot be avoided by pleading the kind of "material support" claim that falls within the terrorism exception when brought against a country designated by the Secretary of State. To satisfy the domestic tort exception, petitioners must allege that Saudi Arabia, its officials, or employees, committed tortious acts within the United States. Petitioners' complaints do not satisfy that requirement. The court of appeals' decision is the first to consider the interplay of the domestic tort and terrorism exceptions in circumstances such as these, and its holding on this question does not warrant this Court's review.

a. The domestic tort exception is not categorically unavailable for claims that might be brought under the

terrorism exception if the foreign state were designated by the Secretary of State. The court of appeals' reliance (Pet. App. 33a) on language that the terrorism exception applies only in a "case not otherwise covered by this chapter," 28 U.S.C. 1605A(a)(1), was misplaced. The court reasoned from this language that "there would be no need for plaintiffs ever to rely on the Terrorism Exception" unless that provision were exclusive. Pet. App. 31a. But that conclusion is mistaken, because the tort exception is more limited than the terrorism exception in a critical respect. The tort exception "covers only torts occurring within the territorial jurisdiction of the United States," *Amerada Hess*, 488 U.S. at 441. By contrast, the terrorism exception contains no geographic limitation. This difference provides the key to understanding Congress's passage of the terrorism exception. As reflected in the legislative history of earlier versions of the legislation, Congress's concern was not to impose new limits on the domestic tort exception, but instead to expand jurisdiction to cover a narrow class of claims based on conduct abroad. See, *e.g.*, H.R. Rep. No. 702, 103d Cong., 2d Sess. 3, 5 (1994) (explaining that the bill would "expand" jurisdiction to include claims by "an American who is grievously mistreated abroad by a foreign government"). The court erred in concluding that Congress intended in 1996 to narrow the tort exception so as to exclude from its scope acts of terrorism committed within the United States.

b. The United States agrees with the court of appeals, however, that the FSIA should not be construed to allow circumvention of the important limitations Congress imposed on both the domestic tort and the terrorism exceptions to immunity. Petitioners do not allege that officials or employees of the Kingdom of Saudi Ara-

bia personally committed tortious acts in the United States or directed others to do so. The act of Saudi Arabia that forms the central basis of petitioners' claims is that, outside the United States, it donated funds to ostensible charities. *Id.* at 5a. Such acts taken by a foreign government outside the United States, without more, would fall outside the scope of the domestic tort exception. Petitioners seek to overcome the territorial limit on the tort exception by alleging that Saudi Arabia funneled money through those charities to al Qaeda, thereby providing "material support to [the] terrorists" who committed the September 11 attacks in the United States. *Id.* at. 28a; see Pet. 4 (claim concerns Saudi Arabia's alleged "role[] in directing significant financial and logistical support to al Qaeda"). Such allegations of "material support" could establish jurisdiction under the terrorism exception over a state designated as a state sponsor of terrorism by the Secretary of State. But as the court of appeals recognized, if all allegations of extraterritorial "material support" by a state to a terrorist organization were permitted to satisfy the domestic tort exception, "[a]n important procedural safeguard [of the terrorism exception]—that the foreign state be designated a state sponsor of terrorism—would in effect be vitiated." Pet. App. 31a.

The domestic tort exception, moreover, requires not merely that the foreign state's extraterritorial conduct have some causal connection to tortious injury in the United States, but that "the tortious act or omission of that foreign state or of any official or employee" be committed within the United States. 28 U.S.C. 1605(a)(5). In *Amerada Hess*, the Court considered and rejected the argument that domestic effects of a foreign state's tortious conduct abroad satisfy the exception. 488 U.S.

at 441. The Court noted that, in contrast to the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), the tort exception "makes no mention of 'territory outside the United States' or of 'direct effects' in the United States." *Amerada Hess*, 488 U.S. at 441. See *Asociacion de Reclamantes*, 735 F.2d at 1524 ("[W]here Congress intended" domestic effects to suffice "it said so more explicitly," as in Section 1605(a)(2)); *House Report* 21 (to come within the exception, "the tortious act or omission of a foreign state or its officials or employees * * * must occur within the jurisdiction of the United States"). The tort exception's territorial limitation protects against conflict that would arise from asserting jurisdiction over a foreign government's actions taken in its own territory, and also serves to deter foreign courts from exercising jurisdiction over the United States for actions taken in the United States.

Accordingly, the courts of appeals have recognized that jurisdiction under the tort exception must be based entirely on acts of the foreign state within the United States. See *Asociacion de Reclamantes*, 735 F.2d at 1525 ("the entire tort" committed by the foreign state must "have occurred here"); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984) ("Iran is immune from tort suits here for actions taken by it on its own territory."), cert. denied, 469 U.S. 81 (1984). For example, in *O'Bryan* v. *Holy See*, 556 F.3d 361 (2009), petition for cert. pending, No. 08-1384 (filed May 7, 2009), the Sixth Circuit held that "any portion of plaintiffs' claims that relies upon acts committed by the Holy See abroad cannot survive," including "negligent supervision" abroad of clergy in the United States. *Id.* at 385.

Petitioners do not argue that jurisdiction under the tort exception could be premised entirely on acts by

Saudi Arabia and its officers or employees in the United States, as the cases just cited require. Rather, petitioners contend that the domestic acts of the September 11 hijackers should be ascribed to Saudi Arabia under a concerted-action theory. Pet. Reply Br. 7 (relying on "conspiracy and aiding and abetting claims" to satisfy territoriality requirement). Jurisdiction under the tort exception, however, cannot be based on the tortious acts of third parties, even if the applicable substantive law would permit holding the foreign state liable for those acts under a theory of secondary liability. The jurisdictional inquiry is one of federal law, and the FSIA tort exception strips foreign states of immunity only for injuries "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5). It is the foreign state's act or omission—not that of any third party—that must occur in the United States.[4]

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[4] The Federal Insurance complaint does allege that "a Saudi intelligence official named Omar al Bayoumi provided direct assistance to * * * two of the September 11th hijackers" to facilitate their settlement in San Diego in early 2000. C.A. App. 2004 (¶ 411). That allegation, though it does satisfy the territoriality requirement, does "not permit the court to infer more than the mere possibility of misconduct," and is therefore inadequate to sustain petitioners' burden. *Ashcroft* v. *Iqbal*, No. 07-1015 (May 18, 2009), slip op. 15. Indeed, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) found, after considering that connection and others, that al Bayoumi was "an unlikely candidate for clandestine involvement with Islamic extremists." *9/11 Commission Report* 218 (visited May 27, 2009) <http://www.9-11commission.gov/report/911Report.pdf>.

The same complaint alleges that certain charities used offices in the United States to provide financing to al Qaeda. See, *e.g.*, C.A. App. 1942 (¶ 108) (alleging Benevolence International Foundation laundered over $1 million for al Qaeda). The claims against those charities remain

The court of appeals' decision is the first to grapple with the interplay between the FSIA's terrorism and domestic tort exceptions in a factual circumstance of this kind. Although petitioners assert a conflict with appellate decisions permitting suit under the domestic tort exception for acts of extrajudicial killing, those cases are distinguishable because they involved acts in the United States directly attributable to the foreign governments. See *Liu* v. *Republic of China*, 892 F.2d 1419, 1421-1422 (9th Cir. 1989) (Taiwanese intelligence agent, acting in the United States, recruited assassins); see also *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984) (noting one assassin was "an American citizen working for Chilean intelligence"), cert. denied, 471 U.S. 1125 (1985). No other court of appeals has considered how to apply the domestic tort exception to allegations of extraterritorial material support for terrorism on the part of a state that has not been designated a sponsor of terrorism. Although the court of appeals' analysis has

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pending in the district court. See Pet. App. 4a; *id.* at 165a-166a & n.30. Petitioners contend (Pet. 7) that the charities were sufficiently controlled by Saudi Arabia that their acts should be ascribed to Saudi Arabia itself. Especially in light of the law's respect for corporate personality, which the FSIA recognizes, see *Dole Food*, 538 U.S. at 474-476, the complaint's "formulaic recitation," *Iqbal*, slip op. 17 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007)), of incidents of control by Saudi Arabia—repeated verbatim with respect to eight charities, see C.A. App. C.A. App. 1934-1964 (¶¶ 85, 111, 131, 151, 168, 181, 191, 208)—provides an insufficient basis for deeming the acts of the charities to be those of Saudi Arabia. Without further factual allegations supporting a conclusion that Saudi Arabia directed acts by the charities in the United States that assisted the September 11 attacks, the complaint fails to satisfy the FSIA's territoriality requirement. In any event, the sufficiency of these allegations to satisfy the FSIA's territoriality requirement as to Saudi Arabia itself presents a fact-bound issue that does not warrant review by this Court.

certain flaws, the court correctly identified the danger that a complaint making this kind of allegation would evade the limitations of the domestic tort and terrorism exceptions. Most important, the court's conclusion that petitioners had not overcome Saudi Arabia's immunity was correct. Further review by this Court is therefore unwarranted.

C. The Court Of Appeals' Personal Jurisdiction Holding, The Scope Of Which Is Still Unclear, Does Not Warrant This Court's Review

1. The touchstone under the Due Process Clause for exercising personal jurisdiction in a civil case is the "requir[ement] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 (1985) (second pair of brackets in original) (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). Although due process is not satisfied merely because a defendant can "foresee" that his actions will "have an effect" in the foreign jurisdiction, one who undertakes "intentional, and allegedly tortious, actions" that are "expressly aimed" at the forum is subject to suit there. *Calder* v. *Jones*, 465 U.S. 783, 789 (1984). It does not matter in such circumstances that the individual defendant is not "able to control" the means by which the tortious injury is caused in the foreign jurisdiction, as long as he acted with the "kn[owledge] that the brunt of th[e] injury" from his tortious act "would be felt" in the foreign forum. *Ibid.* Where the defendant acted with such knowledge, he "must 'reasonably anticipate being haled into court there' to answer for" his actions. *Id.* at 790 (quoting

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 297 (1980)).

2. It is unclear precisely what legal standard the court of appeals applied in affirming the district court's holding that it lacked personal jurisdiction over the Princes for their personal actions. Petitioners focus (Pet. 26) on the court of appeals' statement that allegations that the Princes "intended to fund al Qaeda through their donations to Muslim charities," "[e]ven assuming that [they] were aware of Osama bin Laden's public announcements of jihad against the United States," could not form the basis of jurisdiction. Pet. App. 43a-44a. To the extent the court of appeals' language suggests that a defendant must specifically intend to cause injury to residents in the forum before a court there may exercise jurisdiction over him, that is incorrect. It is sufficient that the defendant took "intentional * * * tortious, actions" and "knew that the brunt of th[e] injury would be felt" in the foreign forum. *Calder*, 465 U.S. at 789-790.

The court of appeals' decision, however, is subject to a more limited construction, which focuses on the inadequacy of the particular allegations before it. At several points, the court of appeals stressed that petitioners' claims were based on "the princes' alleged *indirect* funding of al Qaeda." Pet. App. 44a (emphasis added). See *id.* at 42a-43a (stressing the "causal chain" petitioners rely upon). Where the connection between the defendant and direct tortfeasor is separated by intervening actors, the requirement of showing an "intentional, * * * tortious, act[]" on the part of the defendant, *Calder*, 465 U.S. at 789, demands more than a simple allegation. Petitioners would need to allege facts that could support the conclusion that the defendant acted with the

requisite intention and knowledge. See *Ashcroft* v. *Iqbal*, No. 07-1015 (May 18, 2009), slip op. 16-19.

Read in that fashion, the court of appeals' opinion comports with the opinions of the district court that were under review. That court stressed the inadequacy of petitioners' conclusory allegations to show that the Princes had knowledge that their donations to the charities were being diverted to support international terrorism. See, *e.g.*, Pet. App. 187a (despite "conclusory allegations that Prince Sultan aided and abetted terrorism," petitioners did "not offer any facts to lend support to their allegation that Prince Sultan purposefully directed his activities at this forum by donating to charities that he knew at the time supported international terrorism"); *id.* at 188a ("Conclusory allegations that [Prince Turki] donated money to charities, without specific factual allegations that he knew they were funneling money to terrorists, do not suffice."). Thus, the district court rightly focused on the sufficiency of the allegations to establish that the defendants' intentional acts of funding the charities were done with the knowledge that they would support al Qaeda's jihad against the United States. Regardless whether those conclusions of insufficiency were correct, the court's case-specific holdings on this score do not warrant review by this Court.

3. Even assuming that the court of appeals intended to establish a new legal standard for personal jurisdiction in this case, the presence of a circuit split is doubtful. In each of the three appellate cases cited by petitioners as evidence of a conflict (Pet. 28-29), the defendant was a primary wrongdoer—not, as here, a person whose alleged tortious act consisted of providing material support to another party engaged in tortious conduct. See *Mwani* v. *bin Laden*, 417 F.3d 1, 13 (D.C. Cir.

2005) (Osama bin Laden and al Qaeda "orchestrated the bombing of the American embassy in Nairobi" and other attacks against the United States.); *Panavision Int'l, L.P.* v. *Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (defendant sought to extort money from plaintiff); *Janmark, Inc.* v. *Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (defendant threatened plaintiff's customers in an "effort[] to ruin [plaintiff's] business"). Whatever uncertainties inhere in the court of appeals' decision, it should not be construed to extend to cases of this different kind and thus to create a circuit conflict.

Nor, contrary to the petitioners' suggestion (Pet. 31-32), is the court's error likely to interfere with the government's ability to combat terrorism through criminal prosecutions under the material support provisions of 18 U.S.C. 2339B or terrorism financing provisions of 18 U.S.C. 2339C. The court of appeals' decision concerns only personal jurisdiction. It does not speak to the legislative jurisdiction of Congress to apply federal law extraterritorially. Pet. App. 39a. Moreover, in a criminal case, personal jurisdiction is based on the physical presence of the defendant in the forum, independent of any minimum-contacts analysis. See *Ker* v. *Illinois*, 119 U.S. 436, 443-444 (1886).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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